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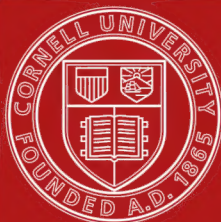
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**A treatise on the law of railroads; conta**



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A TREATISE  
ON THE  
LAW OF RAILROADS

CONTAINING A CONSIDERATION OF THE ORGANIZATION, STATUS AND  
POWERS OF RAILROAD CORPORATIONS, AND OF THE RIGHTS  
AND LIABILITIES INCIDENT TO THE

LOCATION, CONSTRUCTION AND OPERATION  
OF RAILROADS

AND ALSO THE  
DUTIES, RIGHTS AND LIABILITIES OF RAILROAD COMPANIES

AS CARRIERS

UNDER THE RULES OF THE COMMON LAW AND THE  
INTERSTATE COMMERCE ACT

BY  
BYRON K. ELLIOTT  
AND  
WILLIAM F. ELLIOTT

Authors of Roads and Streets, Appellate Procedure and  
General Practice

**In Four Volumes**

VOLUME IV

INDIANAPOLIS AND KANSAS CITY  
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# CARRIERS.

## CHAPTER LV.

### RAILROADS AS CARRIERS.

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§ 1391. **Nature of duty as common carriers.**—Railroads are instrumentalities of commerce, and in a limited sense railroad companies are public agents. They are not public agents in the sense that they can bind the public but they are public agents in the sense that they are created for the purpose of transporting goods and passengers, and thus in great part conducting the commerce of the country. This is a public service.<sup>1</sup> As we have said, they “are affected with a public interest,” and for that reason the governmental control over them is much greater than over a purely private corporation. As the functions of railroad companies in carrying goods and passengers are essentially public, they have no right to un-

<sup>1</sup> *State v. Boston, etc., R. Co.*, 25 Vt. 433; *Newburyport, etc., Co. v. Eastern Metc (Mass.)* 564.

*R. Co.*, 23 Pick. 326; *Inhabitants of*

justly discriminate in favor of some citizens and against others, but under similar circumstances or conditions must treat all who seek transportation alike.<sup>1</sup>

§ 1392. **Implied duties as carriers.**—In accepting the grant of rights and franchises from the state a railroad corporation impliedly assumes the duty of a common carrier. The consideration for the grant is the undertaking of the corporation to impartially perform this public duty. The duty is in the true sense a public one and one which every member of the community has a right to demand that the corporation shall perform. The benefit to the community is the consideration for the important rights and franchises conferred upon the corporation by its charter. From the fact that the company is authorized to build, maintain and operate a commercial railroad may be inferred its duties, rights and obligations as a common carrier of goods and passengers, but authority to build and operate a railroad for the carriage of passengers only, as, for instance, in the case of a street railway, does not authorize the inference that there is an implied duty to carry goods.<sup>2</sup>

<sup>1</sup> *Messenger v. Penna. R. Co.*, 36 N. J. L. 407; *Cumberland, etc., R. Co.'s Appeal*, 62 Pa. St. 218; *Vincent v. Chicago, etc., R. Co.*, 49 Ill. 33; *Great Western, etc., R. Co. v. Sutton*, L. R., 4 H. L. 226. We are here treating only of the general nature of the duty. We have elsewhere treated of the right to make different rates under different circumstances and conditions. That different rates may be made where circumstances are unlike has been often held. See *Eclipse, etc., Co. v. Pontchartrain R. Co.*, 24 La. Ann. 1; *Sargent v. Boston, etc., R. Co.*, 115 Mass. 416; *McDuffee v. Portland, etc., R. Co.*, 52 N. H. 430; *Shipper v. Penna. R. Co.*, 47 Pa. St. 338; *Stewart v. Erie, etc., R. Co.*, 17 Minn. 372.

<sup>2</sup> In *Davis v. Button*, 78 Cal. 247, 20 Pac. 545, it is held that an instruction that, if defendant was engaged in the

business of transporting passengers for hire on a railroad operated by him, the law denominates him a "common carrier," is correct. See *Palmer v. Grand Junction, etc., R. Co.*, 4 M. & W. 749; *Pennsylvania Co. v. Clark*, 2 Ind. App. 146, 27 N. E. 586; *Richards v. London, etc., R. Co.*, 7 C. B. 839; *Cranch v. London, etc., R. Co.*, 255; *Houston, etc., R. Co. v. Harn*, 44 Tex. 628. *Burbridge v. Kansas City C. R. Co.*, 36 Mo. App. 669, was an action for injuries to the person of a passenger on a street-car, and the answer admitted that defendant was a street railroad corporation, duly organized and existing under general statutes of the state. *Held*, that this was in effect an admission that it was a common carrier of passengers. An allegation of a contract to carry, coupled with the averment and fact that defendant

The implied duty of an ordinary commercial railroad does not extend so far as to require all trains to carry passengers or all trains to carry goods, but, on the contrary, the company may, within reasonable limits, determine what trains shall transport passengers and what trains shall transport goods. Citizens have no right to demand that trains provided for carrying goods shall carry passengers, nor, on the other hand, that passenger trains shall carry goods.

§ 1393. **Railroads as carriers—Generally.**—It is evident from what has been said that railroad companies conducting ordinary commercial railroads are always common carriers of goods, and as such ordinarily bound to accept property of the kind they undertake to carry, properly tendered,<sup>1</sup> although the

was a railroad corporation, is sufficient to show the character of the defendant as a common carrier. *Kain v. Kansas City, St. J. & C. B. R. Co.*, 29 Mo. App. 53. As to difference between common carrier and forwarder see *Schloss v. Wood*, 11 Colo. 287, 17 Pac. Rep. 910. The question as to whether a party in any given case is a common carrier is sometimes one of fact for the jury. *Avinger v. South C. R. Co.*, 29 S. Car. 265, 7 S. E. Rep. 493, 35 Am. & Eng. R. Cas. 519.

<sup>1</sup>*Pickford v. Grand J. R.*, 12 M. & W. 766; *Oxlade v. Northeastern R. Co.*, 9 C. B. N. S. 896; *Eagle v. White*, 6 Whart. (Pa.) 505; *Crouch v. London, etc., R. Co.*, 14 Com. B. 255, 23 L. J. C. P. 73; *Nashville R. Co. v. Messino*, 1 Sneed 220; *Nashville, etc., R. Co. v. David*, 6 Heisk. (Tenn.) 261; *Dill v. South Carolina R. Co.*, 7 Rich. L. 158; *Norway Plains Co. v. Boston, etc., R.*, 1 Gray 263; *Finn v. Western R. Co.*, 112 Mass. 524; *Thomas v. Boston, etc., R. Co.*, 10 Met. 472, 43 Am. Dec. 444; *Rogers L. Works v. Erie, etc., R. Co.*, 20 N. J. E. 379; *Fuller v. N. Nauvaton R. Co.*, 21 Conn. 556; *Jones v. Western, etc., R. Co.*, 27 Vt. 399;

*Noyes v. Rutland, etc., R. Co.*, 27 Vt. 110; *Root v. Great Western R. Co.*, 45 N. Y. 524; *Contra Costa, etc., R. Co. v. Moss*, 23 Cal. 323; *Elkins v. Boston, etc., R. Co.*, 23 N. H. 275; *East Tennessee, etc., R. Co. v. Nelson*, 1 Cold. 272; *Southwestern R. Co. v. Webb*, 48 Ala. 585; *Mississippi C. R. Co. v. Kennedy*, 41 Miss. 671; *Southern Ex. Co. v. Moon*, 39 Miss. 822; *Weed v. Saratoga & S. R. Co.*, 19 Wend. (N. Y.) 534; *Camden R. Co. v. Burke*, 13 Wend. (N. Y.) 611, 28 Am. Dec. 488; *Scofield v. Railway Co.*, 43 Ohio St. 571, 1 West Rep. 112; *Mobile, etc., R. Co. v. Weiner*, 49 Miss. 725; *Pennell v. Cullen*, 5 Harr. (Del.) 238; *Lawrenceburgh & U. M. R. Co. v. Montgomery*, 7 Ind. 474; *Ohio, etc., R. Co. v. Yohe*, 51 Ind. 181; *Murch v. Concord R. Co.*, 29 N. H. 9; *Peidmont M. Co. v. Columbia R. Co.*, 19 S. Car. 353, 16 Am. & Eng. R. Cas. 194; *Richards v. London, etc., R. Co.*, 7 C. B. 839, 18 L. J. C. P. 251; *Pegler v. Monmouthshire R. Co.*, 30 L. J. Ex. 249, 6 Hurl. & N. 644; *Palmer v. Grand J. R. Co.*, 4 Mees. & W. 749; *Avinger v. South C. R. Co.*, 29 S. Car. 265, 7 S. E. R. 493, 35 Am. & Eng. R. Cas. 519;

statute or charter may not expressly impose that duty upon them.<sup>1</sup> So, too, passengers who properly ask transportation must be carried, since the obligation to carry is always implied.<sup>2</sup> All who operate a railroad under the charter, be they private individuals,<sup>3</sup> receivers,<sup>4</sup> or trustees,<sup>5</sup> must perform this implied public duty. A company which has undertaken to carry in the usual way will not be relieved from the carrier's liability because its road is incomplete and not formally opened.<sup>6</sup>

§ 1394. **Carriage for other carriers.**—There are cases holding that railroad companies are bound to transport the cars of other companies, and while so transporting and in complete control of them are liable as common carriers for any injuries to them.<sup>7</sup> But, as we have heretofore seen, where there is

*Armentrout v. St. Louis, etc., R. Co.*, 1 Mo. App. 158; *Houston, etc., R. Co. v. Harn*, 44 Tex. 628; *Hubbard v. Harnden, Ex. Co.*, 10 R. I. 244; *Mobile, etc., R. Co. v. Williams*, 54 Ala. 168; *Parker v. Great Western R. Co.*, 7 Man. & G. 253; *Muschamp v. Lancaster R. Co.*, 8 M. & W. 421; *Chicago R. Co. v. Thompson*, 19 Ill. 578; *Garton v. Bristol, etc., R. Co.*, 1 B. & S. 112.

<sup>1</sup> "We suppose it is not necessary that the charter should provide in so many words that the railroad created by it shall be a common carrier. The authorities are numerous to the point, that such companies using cars for the purpose of carrying goods for all persons indifferently for hire, and whose custom and uniform practice is to do so, are common carriers and liable as such. There can be no doubt on this point." *Chicago, etc., R. Co. v. Thompson*, 19 Ill. 578.

<sup>2</sup> We are here speaking only of the general duty to carry, and do not mean to be understood that persons not in a fit condition to be carried, as, for instance, persons with contagious diseases or the like, can compel a railroad company to carry them.

<sup>3</sup> *Davis v. Button*, 78 Cal. 247, 20 Pac. R. 545.

<sup>4</sup> *Blumenthal v. Brainerd*, 38 Vt. 402; *Paige v. Smith*, 99 Mass. 395; *Nichols v. Smith*, 115 Mass. 332. And a receiver may not refuse to receive from and deliver to a connecting road loaded or empty freight cars of that company because, by doing so, his own road may become involved in a strike of locomotive engineers, whose associates have "gone out" on such connecting road, and who are attempting to boycott it. *Beers v. Wabash, etc., R. Co.*, 34 Fed. R. 244, 35 Am. & Eng. R. Cas. 646.

<sup>5</sup> *Sprague v. Smith*, 29 Vt. 421; *Faulkner v. Hart*, 44 N. Y. Sup. Ct. 471; *Rogers v. Wheeler*, 2 Lans. 486, affirmed in 43 N. Y. 598.

<sup>6</sup> *Little Rock, etc., R. Co. v. Glide-well*, 39 Ark. 487.

<sup>7</sup> *Peoria & P. U. Ry. Co. v. Chicago, etc., Ry. Co.*, 109 Ill. 135, s. c. 18 Am. & Eng. R. Cas. 506; *New Jersey R. & I. Co. v. Pennsylvania R. Co.*, 27 N. J. L. 100; *Vermont & M. R. Co. v. Fitchburg R. Co.*, 14 Allen 462; *Mal-lory v. Tioga R. Co.*, 39 Barb. 488; *Hannibal R. v. Swift*, 12 Wall. 262;

a right to refuse to carry, a special contract may be made limiting the liability. There is, indeed, no liability as a common carrier where there is a right to enter into a contract such as makes the company a private carrier and a contract of that kind is executed.<sup>1</sup> In the Express Cases,<sup>2</sup> it was held that, while it was the duty of the railroad companies to carry express matter for the public, yet they can choose their own means for the carriage, provided, of course, there is reasonable promptness and security; and that express companies do business under special contracts which admit them to the road as a privilege, not as a right.

Atchison, etc., R. Co. v. Denver, etc., R. R. Co., 110 U. S. 667, 16 Am. & Eng. R. Cas. 57; Peoria & P. U. S. R. Co. v. United States R. S. Co., 136 Ill. 643, 49 Am. & Eng. R. Cas. 81; Missouri P. R. Co. v. Chicago & A. R. Co., 25 Fed. R. 317, 23 Am. & Eng. R. Cas. 718. Railroad companies are, in many states, required by statute to receive and transport the cars of other companies when requested. Peoria, etc., R. Co. v. Chicago, etc., R. Co., 109 Ill. 135, 18 Am. & Eng. R. Cas. 506, 511, note; Michigan Central R. Co. v. Smithson, 45 Mich. 212, 7 N. W. R. 791, 1 Am. & Eng. R. Cas. 101; Rae v. Grand Trunk R. Co., 14 Fed. R. 401, 9 Am. & Eng. R. Cas. 470; Texas & P. R. Co. v. Carlton, 60 Tex. 397, 15 Am. & Eng. R. Cas. 350. A railroad company, having received loaded cars to be delivered to a consignee and returned when unloaded, it becomes liable as a common carrier for their safe return, and hence it is responsible for the loss of the cars by fire while in the yards of the consignee. East St. Louis C. Ry. Co. v. Wabash, St. L. & P. Ry. Co., 24 Ill. App. 279. This case was reversed in 123 Ill. 594, 15 N. E. R. 45, 32 Am. & Eng. Cas. 522, the court holding that when the cars were placed on the

consignee's private track, they had reached their destination, and consequently the company's liability as an insurer had ceased, to be revived when the cars were unloaded and returned by the consignee. The court distinguishes this case from Peoria & P. U. Ry. Co. v. Chicago, etc., Ry. Co., 109 Ill. 135. Under S. C. Gen. Stat., § 1471, a railroad can not refuse to carry the cars of connecting roads, although they are of an old pattern and not so safe and convenient as its own. Simms v. South Carolina R. Co., 26 S. Car. 490, 2 S. E. R. 486.

<sup>1</sup> Post, § 1396, Chicago, etc., R. Co. v. Wallace, 66 Fed. R. 506, s. c. 30 L. R. A. 161; Peoria, etc., R. Co. v. United States, etc., Co., 136 Ill. 643, s. c. 27 N. E. R. 59. See Peoria, etc., R. Co. v. Chicago, etc., R. Co., 109 Ill. 135.

<sup>2</sup> St. Louis, I. M. & S. R. Co. v. Southern Ex. Co., 117 U. S. 1 and 601, 23 Am. & Eng. R. Cas. 545, 6 Sup. Ct. R. 542. It is held, in Sargent v. Boston, etc., R. Co., 115 Mass. 416, that the conduct of an express business is within the corporate powers of a railroad company. The leading case, *supra*, overruled the following: Wells, Fargo & Co. v. Northern P. R. Co., 23 Fed. R. 469, 18 Am.

§ 1395. **Breaking bulk—Transfer of goods from cars of one company to cars of another company.**—It is vigorously maintained by some of the courts that a railroad company may be compelled to receive and transport goods in the cars of another company without compelling a breaking of bulk and the transfer of the goods from the cars in which they were originally loaded to the cars of a company over whose lines the goods must pass to reach their destination.<sup>1</sup> There is great force in the reasoning of the court in the cases referred to,<sup>2</sup> and it is difficult to successfully controvert the conclusions asserted in those cases, but the question is one that admits of fair debate. The rule which those cases assert is, we venture to say, a reasonable one and is one, which, if enforced, would promote the interests of commerce. There is, at all events, reason for affirming that railroad companies as instruments of commerce and as public agents,<sup>3</sup> must haul cars of other com-

& Eng. R. Cas. 440; *Southern Express Co. v. Memphis, etc., R. Co.*, 2 McCrary 570; *United States v. Memphis, etc., R. Co.*, 6 Fed. R. 237; *Wells, Fargo & Co. v. Oregon R., etc., Co.*, 8 Sawyer 600, s. c. 18 Fed. R. 517, 16 Am. & Eng. R. Cas. 71, 87.

<sup>1</sup> *Peoria, etc., Co. v. Chicago, etc., R. Co.*, 109 Ill. 135, s. c. 18 Am. & Eng. R. Cas. 506; *Burlington, etc., R. Co. v. Dey*, 82 Iowa 312, s. c. 45 Am. & Eng. R. Cas. 391, 404.

<sup>2</sup> In *Burlington, etc., R. Co. v. Dey*, 82 Iowa 312, s. c. 45 Am. & Eng. R. Cas. 391, 404, it was said: "The fact that the transfer of cars from one company to another, for the transportation of property over more than one railroad, without breaking bulk has been practiced so long as to be recognized as a course of business of which we will take judicial notice." It was also said: "Surely a course of business so long pursued and so extensively prevailing, and demanded by the commerce of the company, can not, when recognized and required by statute,

become so oppressive in principle, so oppressive in operation, as to require the statute to be declared unconstitutional. A railway company, as a common carrier, is required to receive and transport freight offered to it for transportation. The reasons upon which this rule is founded, impose upon it the obligation to haul cars of other companies brought to it for transportation over its own road." See, generally, *Beers v. Wabash, etc., R. Co.*, 34 Fed. R. 244, 35 Am. & Eng. R. Cas. 646, 649; *Toledo, etc., R. Co. v. Pennsylvania Co.*, 54 Fed. R. 730, 735; *Toledo, etc., R. Co. v. Pennsylvania Co.*, 54 Fed. R. 746, 750.

<sup>3</sup> In *New England, etc., Co. v. Maine, etc., Co.*, 57 Me. 188, the court said: "It is true that these railroad corporations are private, and, in the nature of their business, are subject to, and bound by the doctrine of common carriers, yet, beyond that, and in a peculiar sense, they are entrusted with certain functions of the government in order to afford the



panies and can not compel the breaking of bulk and the transfer of goods to their own cars. The consideration for the grant of the valuable franchises to railroad corporations is that, as instruments of commerce, they will promote the public good by transporting goods in such a mode as the interests of commerce require. It seems to us that the evolution and expansion of commerce is one of the things which railroad companies must take into account in accepting the franchises bestowed upon them and that they must yield to the demands of development and progress. If there be no duty to haul the cars of another company and there is a right to compel the breaking of bulk and the transfer of goods, then a railroad company may compel the breaking of bulk although its road has a haul of no more than the tenth or one-hundredth part of a mile. So, it may, if there be no such duty, compel the breaking of bulk, although the expense of the transfer may be very great, and, if there be no such duty, so it may compel a transfer, even though the transfer and the delay may destroy the property of the shipper. If there be no such duty, then a car starting from the Pacific coast destined to the Atlantic may be stopped and bulk broken as many times as there may be different lines of railroads composing the route. We find it difficult to believe that the law ever intended that any such consequences should result, but there is strong reason for the opposite opinion. The question is not as to the rights of railroad companies between themselves, as, for instance, the rate of freight that each shall receive, or the like, but the question is as to the rights of persons to have their property transported without unnecessary delay and without injury, or liability to injury from delay or from the transfer of the goods from

public necessary means of transportation. The bestowment of these franchises is justified only on the ground of the public good, and they must be held and enjoyed to that end." It was also said: "So far as their duty to serve the public is concerned they are not only common carriers, but

public agents." See, also, *Palmer v. Grand Junction R. Co.*, 4 M. & W. 749; *Messenger v. Pennsylvania Co.*, 37 N. J. L. 531; *Messenger v. Pennsylvania Co.*, 36 N. J. 407, s. c. 13 Am. R. 457; *Atlantic, etc., R. Co. v. Laird*, 58 Fed. R. 760, s. c. 7 C. C. A. 489.

the cars of one company to those of another company. It is no doubt true that a railroad company is not to be required to suffer a loss, but if it is yielded a full compensation there seems to be much reason for holding that it can not compel bulk to be broken, and should haul cars of other companies. The federal decisions, however, assert a different doctrine from that declared in the cases in the state courts to which we have referred, for they affirm that one company can not be compelled to haul the cars of another company, but may refuse to haul such cars, may require a transfer of the goods to its own cars,<sup>1</sup> and may also require that the goods be "re-billed" over its line.<sup>2</sup> The question is one of difficulty, and there is force in the reasoning of the federal courts, but there is also strength in the reasoning of the advocates of a different doctrine.

§ 1396. **Railroad companies as private carriers.**—Ordinarily the contract or duty to transport goods or passengers constitutes a railroad company a common or public carrier, but a railroad company may, by contract, undertake the duty of transporting goods or passengers in the capacity of a private carrier. Where, however, there is no contract express or implied providing that the transportation is undertaken in the capacity of a private carrier, the presumption is that the duty was undertaken in the capacity of a public or common carrier. Where cars are furnished by the person with whom the company contracts under

<sup>1</sup> In some of the federal cases, if not in all, the question arose between the railroad companies and did not involve the right of an owner of goods to have them carried without breaking bulk. Much that is said in the opinion in one of the cases is mere *dicta*.

<sup>2</sup> *Little Rock, etc., R. Co. v. St. Louis, etc., R. Co.*, 59 Fed. R. 400. *Oregon, etc., R. Co. v. Northern, etc., R. Co.*, 51 Fed. R. 465. In the case last cited, Mr. Justice Field said: "There can be no usage founded in reason requiring the receiving company to transport the freight in the

cars in which it is tendered where its own cars are not in use. The receiving company is not under any obligation to allow its own cars to remain idle in order to transport those of another company; in such cases, that is, where it has sufficient cars for the purpose not in use, it may properly refuse to receive the freight unless it is transferred to them." In the case referred to, Deady, J., dissented, and, as it seems to us, his reasoning is conclusive. See, also, *Kentucky, etc., Co. v. Louisville, etc., Co.*, 37 Fed. R. 567.

a special agreement, and the company has no control over the cars, the general rule is that its undertaking is that of a private carrier.<sup>1</sup> A common carrier may by contract in particular instances become a private carrier,<sup>2</sup> but a railroad company can not escape the obligation which the law imposes upon it by insisting that a person who desires transportation for himself or goods shall accept the services of the company in the capacity of a private carrier, for where there is a duty to carry as a public or common carrier performance of that duty may be enforced. While a railroad company can not by contract or otherwise change the nature of its public duties or obligations it may, where it is not under a duty or obligation to the public, contract to perform service in the character of a private carrier of goods or passengers. In other words, where there is a right to refuse to perform the services requested there is a right to contract for their performance in a different capacity from that which rests upon a railroad company as a public or common carrier.<sup>3</sup> Where a railroad company is sued in the capacity of a common carrier the plaintiff will fail if the evidence shows that the undertaking to carry was in the capacity of a private carrier.<sup>4</sup> The rule asserted in the case referred to is but the

<sup>1</sup> Chicago, etc., R. Co. v. Wallace, 66 Fed. R. 506, s. c. 30 L. R. A. 161; Robertson v. Old Colony, etc., R. Co., 156 Mass. 525; Coup v. Wabash, etc., R. Co., 56 Mich. 111, s. c. 56 Am. R. 374; Forepaugh v. Delaware, etc., R. Co., 128 Pa. St. 217, s. c. 5 L. R. A. 508.

<sup>2</sup> Railroad Co. v. Lockwood, 17 Wall. 357; Chicago, etc., R. Co. v. Wallace, 66 Fed. R. 506, s. c. 30 L. R. A. 161. See, generally, as to when the undertaking is that of a private carrier. St. Louis, etc., R. Co. v. Southern Ex. Co., 117 U. S. 1; Lake Shore, etc., R. Co. v. Perkins, 25 Mich. 329; Liverpool, etc., R. Co. v. Phenix Ins. Co., 129 U. S. 397; Honeyman v. Oregon, etc., Ry. Co., 13 Ore. 352, s. c. 57 Am. R. 20; Powell v. Mills, 30 Miss. 231, s. c.

64 Am. Dec. 158; Michigan, etc., R. Co. v. McDonough, 21 Mich. 165, s. c. 4 Am. R. 466; Fish v. Chapman, 2 Ga. 349, s. c. 46 Am. Dec. 393; Piedmont, etc., Co. v. Columbia, etc., R. Co., 19 So. Car. 353. The case of Mallory v. Tioga, etc., R. Co., 39 Barb. 488, seems to be opposed to the weight of authority in some respects.

<sup>3</sup> Railroad Co. v. Lockwood, 17 Wall. 357; Honeyman v. Oregon, etc., R. Co., 13 Ore. 352; Central, etc., R. Co. v. Lampley, 76 Ala. 357; Kimball v. Rutland, etc., R. Co., 26 Vt. 247.

<sup>4</sup> In the case of Chicago, etc., R. Co. v. Wallace, 66 Fed. R. 506, s. c. 30 L. R. A. 161, the declaration charged the defendant in the capacity of a common carrier but the evidence showed that the undertaking was in

application, to a particular instance, of the general doctrine that a plaintiff can not declare upon one theory and recover upon a different one. There is, to be sure, strong reason for applying the general rule to such an instance for the liability of a private carrier is essentially different from that of a common carrier.

§ 1397. **Right to prescribe extent of liability where a railroad company undertakes service as a private carrier.**—The considerations of public policy which are held to fetter the right to prescribe limitations upon the liability of a railroad carrier where it undertakes as a common or public carrier do not exist in cases where it has a right to contract to carry goods or passengers in the capacity of a private carrier, so that the company, where it undertakes to carry as a private carrier, may rightfully impose limitations that it could not impose if it were undertaking a duty resting upon it in its character of a common carrier.<sup>1</sup> The authorities warrant the conclusion that a private carrier may effectively stipulate that it shall not be liable for injuries resulting from negligence.<sup>2</sup> Where goods are received by a railroad company in the capacity of a private carrier it does not insure that they shall be safely carried and is only liable for an injury caused by its negligence, nor does the acceptance of goods for transportation impose upon it the obligations of a common carrier where they are received under an effective contract made in the capacity of a private carrier.<sup>3</sup>

the capacity of a private carrier and it was held that there could be no recovery the court saying, *inter alia*, that, "The plaintiff, if he recover, should recover according to his declaration. *Kimball v. Rutland, etc., R. Co.*, 26 Vt. 247, s. c. 62 Am. Dec. 567; *White v. Great Western, etc., R. Co.*, 2 C. B. (N. S.) 7."

<sup>1</sup> *Chicago, etc., R. Co. v. Wallace*, 66 Fed. R. 506, s. c. 30 L. R. A. 161; *Watson v. North British, etc., R. Co.*, 3 Scotch Sess. Cas. (4th series) 637. See, generally, as to the distinction be-

tween duties of railroad companies as public and private carriers. *New Jersey, etc., R. Co. v. Pennsylvania R. Co.*, 27 N. J. Law 100; *Terre Haute, etc., R. Co. v. Chicago, etc., R. Co.*, 150 Ill. 502, s. c. 37 N. E. R. 915.

<sup>2</sup> *Wells v. Steam Nav. Co.*, 2 N. Y. (2 Coms.) 204.

<sup>3</sup> *Wells v. Steam Nav. Co.*, 2 N. Y. (2 Coms.) 204; *Chicago, etc., R. Co. v. Wallace*, 66 Fed. R. 506, s. c. 30 L. R. A. 161. See, generally, *East India, etc., R. Co. v. Pullan*, 1 Strange 690; *Brind v. Dale*, 8 Carr. & P. 207, s. c. 34

§ 1398. **Switching companies.**—There is some confusion in the authorities as to the nature of the duties and liabilities of switching companies. In one of the Illinois cases it was held that a company which received the cars of another company is as to such car and the freight therein a common carrier,<sup>1</sup> but in subsequent cases there seems to be some modification of the general doctrine, or perhaps, some difference in the application of the doctrine.<sup>2</sup> In another case it was held that where a railroad company undertakes to switch a loaded car from the track of another company to its own track it thereby assumes the duty of a common carrier.<sup>3</sup> It is held by some of the courts that where a company is under no obligation to switch the cars of another company but undertakes to do so under a contract providing for the payment of a stipulated sum for performing the service it does not assume the duties and liabilities of a common carrier.<sup>4</sup>

§ 1399. **Transfer companies.**—Transfer companies operating

Eng. Com. Law R. 692; *Caton v. Rumney*, 13 Wend. 387; *Alexander v. Greene*, 3 Hill 9; *Alexander v. Greene*, 7 Hill. 533; *Oakley v. Portsmouth, etc., Packet Co.*, 11 Exch. 618; *Collett v. London, etc., Ry.*, 16 Q. B. 984; *United States v. Power*, 6 Mont. 271; *The Dan*, 40 Fed. R. 691.

<sup>1</sup>*Peoria, etc., R. Co. v. Chicago Co.*, 109 Ill. 135, s. c. 18 Am. & Eng. R. Cas. 506.

<sup>2</sup>*Peoria, etc., R. Co. v. United States, etc., Co.*, 136 Ill. 643, s. c. 27 N. E. R. 59, reversing *Peoria, etc., R. Co. v. United States, etc., R. Co.*, 28 Ill. App. 79, distinguishing *Peoria, etc., R. Co. v. Chicago, etc., R. Co.*, 109 Ill. 135, and citing *Mallory v. Tioga, etc., Ry. Co.*, 39 Barb. 488; *East St Louis, etc., R. Co. v. Wabash, etc., R. Co.*, 123 Ill. 594, s. c. 15 N. E. R. 45; *Missouri Pacific R. Co. v. Chicago, etc., R. Co.*, 25 Fed. R. 317; *Vermont, etc., R. Co. v. Fitchburg R. Co.*, 14

*Allen* 462; *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 667, 16 Am. & Eng. R. Cas. 57.

<sup>3</sup>*Missouri Pacific R. Co. v. Wichita, etc., Co.*, 55 Kan. 525, s. c. 40 Pac. R. 899. The court distinguished the cases of *Gregg v. Illinois Cent. R. Co.*, 147 Ill. 550, 35 N. E. R. 343; *Peoria, etc., R. Co. v. United States, etc., R. Co.*, 136 Ill. 643, s. c. 27 N. E. R. 59; *Independence, etc., Co. v. Burlington, etc., R. Co.*, 72 Iowa 535, s. c. 34 N. W. R. 320, adhered to the ruling in *Railroad Co. v. Maris*, 16 Kan. 333, and cited with approval *Scheu v. Benedict*, 116 N. Y. 510, s. c. 22 N. E. R. 1073; *Pindell v. St. Louis, etc., Ry. Co.*, 34 Mo. App. 675; *North Pennsylvania R. Co. v. Commercial, etc., Bank*, 123 U. S. 727, 8 Sup. Ct. R. 266.

<sup>4</sup>*Kentucky, etc., R. Co. v. Louisville, etc., R. Co.*, 37 Fed. 567, s. c. 2 L. R. A. 289.

in conjunction with railroad companies may, in some instances, be regarded as connecting carriers and as such be subject to the liabilities of common carriers. Whether a transfer company is or is not a connecting carrier has been held to be a question of fact for the jury.<sup>1</sup> We suppose, however, that where there is a valid usage or custom by virtue of which transfers are made from one railroad carrier to another by a transfer company acting as an independent carrier the delivery to the transfer company by the initial carrier must, as matter of law, be held to be a delivery to a connecting carrier. We can not see any valid reason why the conclusion just stated is not a sound one, for if there be a usage to transfer by means of an intermediate independent common carrier, whether by boat, railroad or otherwise, the shipper is bound to know that the initial carrier only undertakes, unless the contract otherwise provides, to carry by the usual route and in the usual mode. The distance to be traversed can not, as it seems to us, affect the question if it be true that usage sanctions or requires the services of an intermediate and independent carrier. If the transfer company simply acts as an agent of the initial carrier in transferring the goods, then the transfer company can not be justly regarded as a connecting carrier, nor can it be so considered where the initial carrier simply employs it for its own convenience. Ordinarily the question whether the transfer company was or was not an agent or employe of the initial carrier must be determined upon the facts of the particular case.<sup>2</sup>

<sup>1</sup> *Missouri Pacific R. Co. v. Young*, 25 Neb. 651, s. c. 41 N. E. R. 646, citing *Hooper v. Chicago, etc., R. Co.*, 27 Wis. 81.

<sup>2</sup> In *Nanson v. Jacob*, 12 Mo. App. 125, it seems to be held that "truckmen" or transfer companies can not be regarded as connecting carriers under any circumstances, but, as indicated in the text, we think this depends entirely upon the facts of the particular instance. See, generally,

*Nanson v. Jacob*, 93 Mo. 331. In *Western, etc., R. Co. v. Exposition, etc., Mills*, 81 Ga. 522, s. c. 2 L. R. A. 102, stress was placed upon the fact that all the compensation for carriage was received by the initial carrier. See, also, *Chattock v. Bellamy*, 64 L. J. Q. B. (N. S.) 250; *Munks v. Jackson*, 66 Fed. R. 571, 13 C. C. A. 641; *Brown v. New York, etc., R. Co.*, 75 Hun 355, 27 N. Y. Supp. 69.

§ 1400. **Bridge companies.**—Corporations may be closely connected with railroad companies and may furnish such companies with the facilities for conducting their business and yet not be common carriers. The company to which goods are entrusted for carriage is ordinarily the carrier and not the corporation which supplies to the railroad company the means of discharging its duties as a common carrier of goods and passengers. Thus, a bridge company which owns no freight cars, but which solicits freight for railway companies that will furnish the cars, and merely transfers such cars over its bridge for the railway company furnishing them, charging for its service its regular bridge toll, but making no charge for transporting the freight contained or carried in the cars, is not a common carrier.<sup>1</sup>

§ 1401. **Express, dispatch and fast freight companies.**—Connected with the railroad service are many organizations, sometimes corporations and sometimes individuals, (and they are sometimes in reality composed of several railroad companies) that engage in the transportation of goods as “fast freight lines,” express companies and the like. Such organizations, whether incorporated or not, are in a limited sense, railroad carriers, and, in the strict sense, are common carriers. A transportation company not owning or controlling any means of conveyance itself, but engaging on its own behalf in the business of transporting goods through the agency and over the lines of other carriers of its own selection and employment, is a common carrier. This has been held as to express companies,<sup>2</sup> dispatch com-

<sup>1</sup> *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. R. 567, s. c. 2 L. R. A. 289, 2 Inters. Com. Rep. 351. The terminal facilities of such bridge company do not, in and of themselves, constitute the bridge company a common carrier of property; nor do they, by any clear implication, confer upon it authority “to equip its road, and to transport goods and passengers thereon, and charge compensation therefor.” A railway company

which, by contract with the bridge company, acquires the right to the use of the bridge for its trains, is alone the common carrier as to all traffic thereon.

<sup>2</sup> *Southern Express Co. v. Crook*, 44 Ala. 468; *Gulliver v. Adams Express Co.*, 38 Ill. 503; *Southern Express Co. v. Newby*, 36 Ga. 635; *Southern Express Co. v. Womack*, 1 Heisk. 256; *United States Ex. Co. v. Backman*, 28 Ohio St. 144; *Stadhecker v. Combs*, 9

panies,<sup>1</sup> and fast freight lines.<sup>2</sup> As elsewhere shown carriers such as express companies, fast freight lines and the like are common carriers in all that the term implies. They can not contract for exemption from their own negligence nor for exemption from the negligence of the railroad companies from which their rights are derived. The courts take judicial knowledge of the course of business, and will not permit the rules governing carriers to be evaded by the formation of such companies and their intervention between the railroad company and the shipper. Neither the name adopted nor any mere matters of

Rich. (L.) 193; *Grogan v. Adams Ex. Co.*, 114 Pa. St. 523; *Southern Ex. Co. v. Glenn*, 16 Lea 472; *Bardwell v. American Ex. Co.*, 35 Minn. 344; *Bennett v. Northern Ex. Co.*, 12 Ore. 49; *Overland Ex. Co. v. Carroll*, 7 Colo. 43; *Mather v. American Ex. Co.*, 138 Mass. 55; *Pacific Ex. Co. v. Seibert*, 44 Fed. Rep. 310; *American Ex. Co. v. Pinckney*, 29 Ill. 392; *Baldwin v. American Ex. Co.*, 23 Ill. 197; *American Ex. Co. v. Baldwin*, 26 Ill. 504; *Buckland v. Adams Ex. Co.*, 97 Mass. 124; *Lowell Wire Fence Co. v. Sargent*, 8 Allen 189; *Christenson v. American Ex. Co.*, 15 Minn. 270; *Sweet v. Barney*, 23 N. Y. 335; *Sherman v. Wells*, 28 Barb. (N. Y.) 403; *Haslam v. Adams Ex. Co.*, 6 Bosw. (N. Y.) 235.

<sup>1</sup> *Merchants' D. Co. v. Cornforth*, 3 Colo. 280; *Robinson v. Merchants' D. Co.*, 45 Iowa 470; *Stewart v. Merchants' D. Co.*, 47 Iowa 229; *Wilde v. Merchants' D. Co.*, 47 Iowa 247; *Merchants' D. Co. v. Bolles*, 80 Ill. 473; *Merchants' D. Co. v. Leyson*, 89 Ill. 43; *Merchants' D. Co. v. Joesting*, 89 Ill. 152; *Merchants' Dispatch Transp. Co. v. Bloch*, 86 Tenn. 392, 6 Am. St. Rep. 847, 6 S. W. Rep. 881, 35 Am. & Eng. R. Cas. 579; *Mercantile M. I. Co. v. Chase*, 1 E. D. Smith (N. Y.) 115; *Railway Company v.*

*Wynn*, 88 Tenn. 320, 45 Am. & Eng. R. Cas. 312; *Baker v. Railroad Co.*, 10 Lea 304; *Nashville, etc., R. Co. v. Jackson*, 6 Heisk. 271; *East Tenn. R. Co. v. Hale*, 85 Tenn. 69, 27 Am. & Eng. R. Cas. 36; *Louisville, etc., R. Co. v. Mason*, 11 Lea 116, 16 Am. & Eng. R. Cas. 241; *Hart v. Railroad Co.*, 112 U. S. 331, 18 Am. & Eng. R. Cas. 604; *United States Ex. Co. v. Backman*, 28 Ohio St. 144; *Southern Ex. Co. v. McVeigh*, 20 Gratt. (Va.) 264; *Bank of Ky. v. Adams Ex. Co.*, 93 U. S. 174; *Richards v. Westcott*, 2 Bosw. (N. Y.) 589; *Hersfield v. Adams*, 19 Barb. 577; *Russell v. Livingston*, 19 Barb. 346; *Ayres v. Chicago, etc., R. Co.*, 71 Wis. 372; *McFadden v. Missouri, etc., R. Co.*, 92 Mo. 343, 30 Am. & Eng. R. Cas. 17; *Place v. Union Ex. Co.*, 2 Hilton 19; *New Jersey S. N. Co. v. Merchants' Bank*, 6 How. 344. The use of the term "forwarded" will not screen the Express Company from its common carrier's liability. *Christenson v. American Ex. Co.*, 15 Minn. 270; *Read v. Spaulding*, 5 Bosw. 395; *Southern Ex. Co. v. McVeigh*, 20 Gratt. 264; *Bank of Kentucky v. Adams Ex. Co.*, 93 U. S. R. 174.

<sup>2</sup> *Read v. Spaulding*, 5 Bosw. 395. *Post*, § 1453.



form can change the rule applicable to them since the courts give heed to matters of substance rather than form.

§ 1402. **Street railway companies.**—There is a difference between ordinary street railways and commercial railroads, for street railways are not common carriers of goods, but they are carriers of passengers.<sup>1</sup> A company operating a line of railroad in a street may, of course, be constituted a common carrier in all that the term implies,<sup>2</sup> but street railway companies are usually not carriers of goods, for they are created, as a rule, for a different purpose.<sup>3</sup> In their capacity of passenger carriers street railway companies are held to the exercise of the highest practicable degree of care.<sup>4</sup> The rule as to the degree of care required of such companies, and as to the presumption of negligence, is substantially the same as that which governs ordinary railroad carriers of passengers.<sup>5</sup> The company is, of

<sup>1</sup> *Spellman v. Lincoln, etc., R. Co.*, 36 Neb. 890, s. c. 55 N. W. R. 270, 20 L. R. A. 316; *Cogswell v. West Street, etc., R. Co.*, 5 Wash. 46, s. c. 31 Pac. R. 411, s. c. 7 Am. R. & Corp. R. (Lewis) 48, 52 Am. & Eng. R. Cas. 500; *Citizens', etc., R. Co. v. Merl*, 134 Ind. 609, s. c. 33 N. E. R. 1014; *Citizens', etc., R. Co. v. Twiname*, 111 Ind. 587, s. c. 13 N. E. R. 55; *Holly v. Atlanta, etc., R. Co.*, 61 Ga. 215; *Boikens v. New Orleans, etc., R. Co.*, 48 La. —, 19 So. R. 737; *Booth on Street Railways*, § 324; *Hutchinson on Carriers*, (2d ed.) § 59.

<sup>2</sup> *Levi v. Lynn, etc., R. Co.*, 11 Allen 300, s. c. 87 Am. Dec. 713.

<sup>3</sup> A carrier may be a carrier of passengers and not a carrier of goods, and if a carrier of passengers the service is a public one, or, as is sometimes said, *quasi public*. *Thompson, etc., Co. v. Simon*, 20 Ore. 60, s. c. 25 Pac. R. 147, 43 Alb. L. J. 48, 10 L. R. A. 251.

<sup>4</sup> *Bonce v. Dubuque, etc., R. Co.*, 53 Iowa 278; *Sullivan v. Jefferson Ave. R. Co.*, (Mo.) 34 S. W. R. 566;

*Dudley v. Front Street, etc., R. Co.*, 73 Fed. R. 128; *Gilson v. Jackson, etc., R. Co.*, 76 Mo. 282; *City, etc., R. Co. v. Findley*, 76 Ga. 311; *Holly v. Atlanta, etc., R. Co.*, 61 Ga. 215; *Chicago, etc., Co. v. Engel*, 35 Ill. App. 490; *Topeka, etc., Co. v. Higgs*, 38 Kan. 375; *Southern, etc. R. Co. v. Walsh*, 45 Kan. 653, s. c. 4 Am. R. & Corp. Cas. (Lewis) 231, 26 Pac. R. 45; *Louisville, etc., R. Co. v. Weams*, 80 Ky. 420; *Watson v. St. Paul, etc., R. Co.*, 42 Minn. 46, s. c. 43 N. W. R. 904; *Booth Street Ry.*, § 328.

<sup>5</sup> *Spellman v. Lincoln, etc., R. Co.*, 36 Neb. 890, s. c. 55 N. W. S. 270, 20 L. R. A. 316; *Smith v. St. Paul, etc., R. Co.*, 32 Minn. 1, s. c. 50 Am. R. 550; *Feital v. Middlesex, etc., R. Co.*, 109 Mass. 398, s. c. 12 Am. R. 720; *Van Natta v. People's, etc., R. Co.*, (Mo.) 34 S. W. R. 505; *Black v. Third Ave. R. Co.*, 37 N. Y. S. 830. See *Birmingham, etc., R. Co. v. Clay*, (Ala.) 19 So. R. 309; *Washington v. Spokane, etc., R. Co.*, (Wash.) 42 Pac. R. 628. The rule that negli-

course, not liable unless it has been guilty of negligence,<sup>1</sup> but there is, as we have indicated, a class of cases in which the company has the burden of showing that there was no negligence on its part. There must, it is obvious, be a difference in some respects between the duties of street railway companies to passengers and the duties of ordinary commercial railroads, notably so as to the place of getting on and alighting from the cars, for the members of the one class of companies have no direct control of the streets on which their tracks are laid, while those of the other class have the exclusive right to their tracks and the places of entering and alighting from trains.<sup>2</sup>

gence must be the proximate cause of injury applies, of course, to actions against street railway companies. *Chicago, etc., R. Co. v. Bell*, (Kan.) 41 Pac. R. 209; *White v. West End, etc., R. Co.*, (Mass.) 43 N. E. R. 298. As to what may be regarded as proximate cause, see *Harper v. Philadelphia, etc., Co.*, (Pa.) 34 Atl. R. 356. The general doctrine that contributory negligence will bar a recovery prevails in actions against street railway companies. *Quincy, etc., R. Co. v. Schulte*, 71 Fed. R. 487; *Butler v. Pittsburgh, etc., R.*

*Co.*, 139 Pa. St. 195; *Ashbrook v. Frederick, etc., R. Co.*, 18 Mo. App. 290. There is, however, some difference made in the application of the rule as between ordinary commercial railroads and street railways, inso-much as what would be contributory negligence in the one class of cases may not be so in the other class. See *Booth Street Rys.*, §§ 336-349.

<sup>1</sup> *Bradley v. Second Ave., etc., R. Co.*, 35 N. Y. S. 918.

<sup>2</sup> *Conway v. Lewiston, etc., R. Co.*, 87 Me. 283, s. c. 32 Atl. R. 901.

## CHAPTER LVI.

### DELIVERY AND ACCEPTANCE.

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| <p>§ 1403. Liability begins with delivery.</p> <p>1404. What constitutes complete delivery.</p> <p>1405. Effect of requirement that shipper shall load.</p> <p>1406. Delivery to authorized agent.</p> <p>1407. Delivery to unauthorized person.</p> <p>1408. Delivery by agent of shipper.</p> | <p>§ 1409. Delivery must be for immediate shipment.</p> <p>1410. Notice of delivery.</p> <p>1411. Place of delivery.</p> <p>1412. Delivery to connecting carrier.</p> <p>1413. Evidence of delivery.</p> <p>1414. Delivery to carrier passes title to consignee.</p> |
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§ 1403. **Liability begins with delivery.**—A railroad company is responsible as a common carrier of things either wholly or not at all,<sup>1</sup> that is, “there is no divided duty of safe-keeping and no apportionment in the event of a loss.”<sup>2</sup> If it does not become completely liable as a common carrier then it can not be held in any respect to be liable in that capacity, although it may be liable in some other capacity, as, for instance, in that of a warehouseman. The responsibility begins with the completion of the delivery to it,<sup>3</sup> whether a bill of lading has or not been issued at that time.<sup>4</sup> As a general rule, there is no

<sup>1</sup> *Brind v. Dale*, 8 Carr. & P. 207.

<sup>2</sup> *St. Louis, etc., R. Co. v. Murphy*, 60 Ark. 333, s. c. 30 S. W. R. 419.

<sup>3</sup> *Mason v. Missouri P. R. Co.*, 25 Mo. App. 473; *Mobile, etc., R. Co. v. Weiner*, 49 Miss. 725; *Knight v. Providence, etc., R. Co.*, 13 R. I. 572; *Rubens v. Ludgate Hill, etc., Co.*, 20 N. Y. Supp. 481; *Cragin v. New York, etc., R. Co.*, 51 N. Y. 61; *Aiken v. Chicago, etc., R. Co.*, 68 Iowa 363, s. c. 27 N. W. R. 281; *Illinois R. Co. v.*

*Smyser*, 38 Ill. 354; *St. Louis, etc., R. Co. v. Murphy*, 60 Ark. 333, s. c. 30 S. W. R. 419; *Missouri Pac. R. Co. v. McFadden*, 154 U. S. 155, s. c. 14 Sup. Ct. R. 990.

<sup>4</sup> *St. Louis, A. & I. Ry. Co. v. Neel*, 56 Ark. 279, 19 S. W. Rep. 963, 55 Am. & Eng. R. Cas. 428; *St. Louis, etc., R. Co. v. Murphy*, 60 Ark. 333, s. c. 30 S. W. R. 419. Although the statute provides for the commencement of the common carrier's liability with the is-

liability as a common carrier until delivery,<sup>1</sup> but it is not always necessary that there should be actual delivery and express acceptance, for there may be constructive or implied delivery and acceptance or the matter may be determined very largely by contract or custom.<sup>2</sup> It has been held, however, that leaving goods on a dock near the carrier's boat, in accordance with the usual custom, will not render the carrier liable, in the absence of express notice.<sup>3</sup>

§ 1404. What constitutes complete delivery.—The general rule, as stated by Mr. Hutchinson,<sup>4</sup> is that the delivery to the carrier and his acceptance of the goods begins the instant he or his servants undertake to load them from the conveyance of another carrier upon his own and for that purpose have attached his tackle to them. "When the owner of the goods has done all in his power and all that he is required to do by his understanding with the carrier or the usage of the business to further the shipment, and it becomes then the duty of the carrier to do whatever else is necessary to put them *in transitu*, the delivery and acceptance will be considered as complete from the time the carrier is informed that

suance of the bill of lading, yet the company may become liable before if the goods have been actually delivered and accepted by it. *East, etc., R. Co. v. Hall*, 64 Tex. 615. See, also, *Montgomery, etc., R. Co. v. Kolb*, 73 Ala. 396, s. c. 49 Am. R. 54. But see *Missouri Pac. R. Co. v. Douglas*, 2 Tex. App. (Civil Cas.) 32, s. c. 16 Am. & Eng. R. Cas. 98.

<sup>1</sup> *Southern Ex. Co. v. McVeigh*, 20 Gratt. (Va.) 264; *Truax v. Philadelphia, etc., R. Co.*, 3 Houst. (Del.) 233; *Grosvenor v. New York, etc., R. Co.*, 39 N. Y. 34; *Tower v. Utica, etc., R. Co.*, 7 Hill (N. Y.) 47.

<sup>2</sup> *Merriam v. Hartford, etc., Co.* 20 Conn. 354, s. c. 52 Am. Dec. 344, and note; *Moses v. Boston, etc., R. Co.*, 24 N. H. 71; *Montgomery, etc., R. Co.*

*v. Kolb*, 73 Ala., 396, s. c. 49 Am. R. 54; *Louisville, etc., R. Co. v. Echols*, 97 Ala. 556, s. c. 12 So. R. 304; *Evansville, etc., R. Co. v. Keith*, 8 Ind. App. 57, s. c. 35 N. E. R. 296; *New England, etc., Co. v. Starin*, 60 Conn. 369, s. c. 22 Atl. R. 953; *Bennitt v. Guiding Star*, 53 Fed. R. 936; *Constable v. National, etc. Co.*, 154 U. S. 51, s. c. 14 Sup. Ct. R. 1062; *Pacific Ex. v. Black*, 8 Tex. Civ. App. 363, 27 S. W. R. 830.

<sup>3</sup> *Packard v. Getman*, 6 Cow. (N. Y.) 757, s. c. 16 Am. Dec. 475, and note. But see *Ft. Worth, etc., R. Co. v. Martin*, (Tex. Civ. App.) 35 S. W. R. 21.

<sup>4</sup> *Hutchinson on Carriers*, (2d ed.) § 98, citing *Merritt v. Old Colony Railroad*, 11 Allen 80.

they are ready for him.'"<sup>1</sup> No formal acceptance is necessary.<sup>2</sup> The completion of the delivery, however, usually involves exclusive and actual possession by the carrier, and this possession involves a surrender of custody and control for the time being by the consignor.<sup>3</sup> Thus, where hogs which the owner desired to have transported were, when the train arrived on which he wished them to go, still in a private yard and had yet to be loaded, counted and receipted for, they were held not to be so far delivered to the railroad company as to make it liable for delay in shipping.<sup>4</sup> But, on the other hand, where cattle have been placed in the company's pen for immediate shipment and part of them have actually been loaded on the cars, the cattle are in the custody of the company as a carrier, and not as a warehouseman.<sup>5</sup> And delivery of a horse at a pen and on a chute provided by the company and designated by its agent for use in loading a car is sufficient to establish liability as a common carrier for damages resulting from the rottenness of the chute.<sup>6</sup> Goods stored along the

<sup>1</sup> Hutchinson on Carriers, (2d ed.) § 99; Ill. Cent. R. Co. v. Smyser, 38 Ill. 354. And even though a shipper assumes the duty of loading the property, the carrier is liable for an injury which was likely to result from moving the car by reason of the manner of loading. Doan v. St. Louis, K. & N. W. R. Co., 38 Mo. App. 408.

<sup>2</sup> Aiken v. Chicago, etc., R. Co., 68 Iowa 363; Merriam v. Hartford, etc., R. Co., 20 Conn. 354, s. c. 52 Am. Dec. 344, and note.

<sup>3</sup> Wilson v. Atlanta & C. R. Co., 82 Ga. 386, 40 Am. & Eng. R. Cas. 25, 9 S. E. 1076, citing Wells v. Wilmington, etc., R. Co., 6 Jones' (L.) 47, and distinguishing Central R. v. Hines, 19 Ga. 203; Fleming v. Hammond, 19 Ga. 145. See, also, St. Louis, etc., R. Co. v. Knight, 122 U. S. 79, s. c. 7 Sup. Ct. R. 1132, 1139. In State v. Intoxicating Liquors, 83 Me. 158, 21 Atl. Rep. 840, it was held that a common carrier, having received

goods for carriage, has a special title to them, which gives it a legal right to the custody thereof, before delivery to the consignee, as against one having no right.

<sup>4</sup> Frazier v. Railroad Co., 48 Iowa 571. As to sufficiency of evidence of delivery, see Savannah, etc., R. Co. v. Steininger, 84 Ga. 579, 11 S. E. R. 236, 42 Am. & Eng. R. Cas. 424, note.

<sup>5</sup> Gulf, C. & S. F. Ry. Co. v. Trawick, (Tex.) 15 S. W. 568. But a mere permission by a railroad company's agent to an owner of cattle to place them in the company's yards, no bill of lading having been given, does not render the company liable for damages caused by the escape of the cattle. Fort Worth & D. C. Ry. Co. v. Riley, (Tex. Ct. of App.) 1 S. W. R. 446, 27 Am. & Eng. R. Cas. 49.

<sup>6</sup> McCullough v. Wabash, W. R. Co., 34 Mo. App. 23.

line awaiting shipment, where the owner is to load them when he can get the necessary cars, are not completely delivered to the railroad company until they are so loaded and ready for shipment.<sup>1</sup> And cotton, still in the possession of a compress company, for which the railroad company has as yet given no bill of lading, and of which it has neither the actual or constructive possession nor the custody or control, is not yet delivered to the railroad company for carriage, and the latter is not liable as a carrier to the owner for its loss, although it has not furnished cars for its transportation as rapidly as it had agreed with the compress company to do.<sup>2</sup> So, where a bill of lading of cotton gave the railroad company the privilege of compressing the cotton at its own expense, for convenience of carriage, and exempted it from loss by fire while at depots, stations, and warehouses, it was held that the company was not liable as a common carrier for loss of the cotton by fire, not caused by negligence, while stored in a warehouse for compression, though the warehouseman had received the cotton as agent of the railroad company.<sup>3</sup> Nor is the mere de-

<sup>1</sup> *Wilson v. Atlanta, etc., R. Co.*, 82 Ga. 386, 9 S. E. R. 1076.

<sup>2</sup> *St. Louis, etc., Ry. Co. v. Commercial, etc., Ins. Co.*, 139 U. S. 223, s. c. 11 Sup. Ct. R. 554.

<sup>3</sup> *Lancaster Mills v. Merchants', etc., Co.*, 89 Tenn. 1, 14 S. W. R. 317. But see *Otis Company v. Missouri, Pac. R. Co.*, 112 Mo. 622, 55 Am. & Eng. R. Cas. 636, in which it is held that where a railroad company by the bill of lading reserved to itself the privilege of compressing the cotton which it contracted to transport, such reservation being evidently for its own convenience, the placing of the cotton in the hands of the compress company to be compressed made that company the carrier's agent, for whose negligence the carrier was liable the same as its own negligence; so it was proper to refuse an instruction which asserted that it was incumbent on

the plaintiff, in order to avoid the exception in the bill of lading as to loss by fire, to show that the fire was the result of the defendant's negligence, because this instruction excluded a liability for the negligence of the compress company. As to railroad company's liability for cotton to be compressed before transportation, see, also, *St. Louis, etc., R. Co. v. Knight*, 122 U. S. 79, s. c. 7 Sup. Ct. R. 1132. Cotton was placed on a platform, which, with the consent of the company, had been built adjacent to the company's side track by the municipal authorities, who retained control of it. It had not been received by the company, nor had there been any order to ship it. The company was held not liable as a common carrier. *Brown v. Atlanta & A. L. R. Co.*, 19 S. Car. 39, 13 Am. & Eng. R. Cas. 479. In *Deming v. Merchants'*

livery of a warehouse receipt to the carrier with an order to deliver the goods to it such a constructive delivery of the goods as will render it liable where they are burned in the warehouse before it can remove them.<sup>1</sup>

§ 1405. **Effect of requirement that shipper shall load.**—The shipper is sometimes required by contract or by custom to load or to assist in loading the freight. This requirement may be of importance in determining whether there has been a complete delivery, although it is not always controlling either upon that question or upon the general question of the liability of the carrier. It is evident that where goods remain in the possession and control of the owner under an agreement that he shall load them, when he can get the necessary cars, there is no complete delivery even though they may be upon the premises of the railroad company, and if the company duly furnishes the cars he must not unreasonably delay the train in loading and can not hold the company liable in damages, as for a refusal to receive and carry the goods, if it refuses to delay the train an unreasonable time.<sup>2</sup> But where goods are delivered to the company for immediate shipment and accepted by it and placed in its freight house, it is liable as a common carrier for their loss by fire while in the freight house awaiting shipment which had been delayed on account of the failure of the company to furnish necessary cars, notwithstanding the fact that it was the duty of the shipper to load them.<sup>3</sup> In other words, as stated in the case just cited, the agreement or duty of a shipper to load goods into the cars does

C. P. & S. Co., 90 Tenn. 306, 17 S. W. R. 89, it was decided that, a compress company's receipt having been given, according to usage, by the owner to a carrier, and a bill of lading issued by the latter, the liability of the carrier to the owner began, though the cotton was not yet actually delivered to the carrier.

<sup>1</sup> *Stewart v. Gracy*, 93 Tenn. 314, s. c. 27 S. W. R. 664.

<sup>2</sup> *Louisville, etc., R. Co. v. Godman*, 104 Ind. 490. See, also, *Frazier v. Kansas City, etc., R. Co.*, 48 Iowa 571; *Wilson v. Atlanta, etc., R. Co.*, 82 Ga. 386, s. c. 9 S. E. R. 1076.

<sup>3</sup> *London, etc., Ins. Co. v. Rome, etc., R. Co.*, 144 N. Y. 200, s. c. 39 N. E. R. 79, 61 Am. & Eng. R. Cas. 225, 43 Am. St. R. 752. See, also, *Hannibal R. v. Swift*, 12 Wall. (U. S.) 262.

not necessarily postpone "the time when the railroad company takes on the character of a common carrier." It is sufficient that there has been a complete delivery and acceptance for immediate shipment.

**§ 1406. Delivery to authorized agent.**—The delivery is sufficient if made to an agent acting by the carrier's authority, or to one so placed by the carrier that the consignor has the right to assume that he has been authorized to receive freight.<sup>1</sup> It

<sup>1</sup>*Harrell v. Wilmington & W. R. Co.*, 106 N. Car. 258, 42 Am. & Eng. R. Cas. 417, 11 S. E. R. 286. This was an action to recover a penalty under North Carolina Code, § 1967, for failure to ship goods, the defendant denying their receipt. According to plaintiff's evidence, he carried the goods to defendant's depot. The station agent and one R. were in the office. Plaintiff stated his wish without addressing either of them. R. went out and weighed the goods, went back into the office where the station agent was, and gave a receipt signed, in the latter's name "per R." There was evidence that R. had been in the office several months, that he handled and delivered goods, and had on one occasion shipped them. Plaintiff also testified that when he went to the station to complain of the non-shipment of the goods, the station agent cursed and abused R., saying it was the third time he had done so that fall. *Held*, that the evidence was sufficient to sustain a finding that the goods had been delivered to the defendant. In *Rogers v. Long Island, etc., R. Co.*, 2 Lans. 269, the owner of the trunk sent it to the defendant's depot by an expressman, who placed it within the enclosure of the depot beside the baggage crate, which was locked, and then went the ticket office and informed the ticket agent of the fact, who replied,

"all right;" and it was held that the case should have gone to the jury upon the question of delivery, the court saying that it was enough to establish a delivery; in the first instance, to prove that a person, acting as the agent of the company, received and accepted the property for transportation, even if there should be, in fact, another person having charge of the business of handling freight. "The ticket agent," said the court, "was apparently in charge of the depot. The company which sanctions his employment and thus holds him out to the world as its agent is not at liberty to repudiate his acts." *Hutchinson on Carriers*, (2nd ed.) § 83. See, also, *Minter v. Pacific R. Co.*, 41 Mo. 503, s. c. 97 Am. Dec. 288, and note; *Cronkite v. Wells*, 32 N. Y. 247; *Quimit v. Henshaw*, 35 Vt. 605; *Southern Ex. Co. v. Newby*, 36 Ga. 635; *Fisher v. Geddes*, 15 La. Ann. 14; *Cobban v. Downe*, 5 Esp. 41; *Dwight v. Brewster*, 1 Pick. 50; *Riley v. Horne*, 1 C. & P. 610; *Thurman v. Wells*, 18 Barb. 500; *Wilson v. York, etc., R. Co.*, 18 Eng. L. & Eq. 557; *D'Anjou v. Deagle*, 3 Harris & J. 206; *Lloyd v. Barden*, 3 Strob. 343; *McCourt v. London, etc., R. Co.*, 3 Ir. Rep. C. L. 107; *Winkfield v. Packington*, 2 C. & P. 599; *Boys v. Pink*, 8 Car. & P. 361; *Long v. Horne*, 1 C. & P. 610; *Lloyd v. Barden*, 3 Strob. 343; *Giles v. Taff Vale R. Co.*, 2 E. & B. 822, 23 L. J. Q.



has been held that a shipper may assume, in the absence of anything to the contrary, that a railroad station agent has authority to contract with reference to the acceptance and carriage of freight.<sup>1</sup> But this assumption, in the absence of anything further to justify it, can not safely extend to any contract beyond the usual authority of such agents, and a mere station agent will not, under ordinary circumstances, be presumed to have authority to bind the company by contract to carry freight beyond its own line.<sup>2</sup> Delivery to a drayman or other servant of the company who is accustomed to collect and receive goods for the company at the places of business of its patrons is a delivery to the company,<sup>3</sup> and the company may become responsible for freight or baggage delivered to one who is in the habit of receiving such articles for it at a station where it has no other agent of its own, although such person is the regular agent of a connecting line at such point.<sup>4</sup>

§ 1407. **Delivery to unauthorized person.**—Delivery to an unauthorized person, even if he be an agent or servant of the company, is not a good delivery to the company unless, because of his position or other circumstances for which the com-

B. 43; *Street v. Morrison*, 10 New Bruns. 296. Delivery to an unauthorized person is no delivery unless notice is given. *Trowbridge v. Chapin*, 23 Conn. 595; *Ford v. Mitchell*, 21 Ind. 54; *Leigh v. Smith*, 1 C. & P. 638; *Young v. Canadian Pac. R. Co.*, 1 Manitoba 205.

<sup>1</sup> *Lake Erie, etc., R. Co. v. Rosenberg*, 31 Ill. App. 47; *Pruitt v. Hannibal, etc., R. Co.*, 62 Mo. 527; *Deming v. Grand Trunk, etc., R. Co.*, 48 N. H. 455; *Wood v. Chicago, etc., R. Co.*, 68 Iowa 491, 24 Am. & Eng. R. Cas. 91; *Miller v. Chicago, etc., R. Co.*, 1 Mo. App. Rep. 474.

<sup>2</sup> *Minter v. Southern Kansas R. Co.*, 56 Mo. App. 282; *Gulf, etc., R. Co. v. Hodge*, (Tex.) 30 S. W. R. 829; *Burroughs v. Norwich, etc., R. Co.*, 100 Mass. 26, s. c. 1 Am. R. 78.

<sup>3</sup> *Wilmington, etc., Co. v. Adams Express Co.*, 8 Houst. (Del.) 329, s. c. 32 Atl. R. 250; *Davey v. Mason*, 1 Car. & M. 45; *Baxendale v. Hart*, 21 L. J. Exch. 123, s. c. 6 Exch. 769; *Quarrier v. Baltimore, etc., R. Co.*, 20 W. Va. 424, s. c. 18 Am. & Eng. R. Cas. 535. See, also, *Pickford v. Grand Junction R. Co.*, 12 M. & W. 766; *Whitbeck v. Schuyler*, 44 Barb. (N. Y.) 469; *Boys v. Pink*, 8 Car. & P. 361; *Waldron v. Chicago, etc., R. Co.*, 1 Dak. 351, s. c. 46 N. W. R. 456; *Duff v. Budd*, 3 Brod. & B. 177.

<sup>4</sup> *Jordan v. Fall River R. Co.*, 5 Cush. (Mass.) 69, s. c. 51 Am. Dec. 44; *McCourt v. London, etc., R. Co.*, 3 Ir. Rep. C. L. 107, 402. See, also, *Montgomery, etc., R. Co. v. Kolb*, 73 Ala. 396, s. c. 49 Am. R. 54, 18 Am. & Eng. R. Cas. 512.

pany is responsible, the shipper is justified in assuming that such person has authority to receive the freight for the company. Thus, it has been held that delivery to a deck hand on a steamboat is not a good delivery to the 'carrier.'<sup>1</sup> So, of course, if the shipper has notice that the agent has no such authority this will prevent an assumption to the contrary on the part of the shipper.<sup>2</sup> But if the goods are received and transportation is actually undertaken by the carrier, the fact that the agent had no authority to receive them, even though known to the shipper, will not necessarily relieve the carrier from liability for their loss.<sup>3</sup>

§ 1408. **Delivery by agent of shipper.**—As delivery may be made to the authorized agent of the company, so it may be made by an authorized agent of the shipper. The rules which apply are, in the main, the same in both cases. Where the owner of goods places them with an agent, who is to secure their transportation by a carrier, the agent is presumptively authorized to exercise all the powers necessary to effect the purpose of the agency, and in the absence of any limitation upon his authority which is or ought to be known to the carrier, the acts of the agent in directing and agreeing upon the time, manner, terms and conditions of shipment will bind his principal.<sup>4</sup> It has also been held that when the delivery is disputed, and the proof doubtful, evidence is admissible to show that the shipper's agent who claimed to have delivered the articles had

<sup>1</sup> *Trowbridge v. Chapin*, 23 Conn. 595; *Ford v. Mitchell*, 21 Ind. 54. See, also, *Cronkite v. Wells*, 32 N. Y. 247; *Southern Exp. Co. v. Newby*, 36 Ga. 635; *Blanchard v. Isaacs*, 3 Barb. (N. Y.) 388; *Elkins v. Boston, etc., R. Co.*, 23 N. H. 275; *Porter v. Chicago, etc., R. Co.*, 41 Iowa 358.

<sup>2</sup> See *Walker v. York, etc., R.* 23 L. J. Q. B. 73, s. c. 2 E. & B. 750; *Slim v. Great Northern, etc., R. Co.*, 23 L. J. C. P. 166.

<sup>3</sup> See *Bennett v. American Exp. Co.*,

83 Me. 236, s. c. 13 L. R. A. 33; *Fillebrown v. Grand Trunk R. Co.*, 55 Me. 462, s. c. 92 Am. Dec. 606.

<sup>4</sup> *Hutchinson on Carriers*, §§ 84a, 265; *Mechem on Agency*, § 311; *Nelson v. Hudson River R. Co.*, 48 N. Y. 498; *York Co. v. Illinois Cent. R. Co.*, 3 Wall. (U. S.) 113; *Squire v. New York, etc., R. Co.*, 98 Mass. 239, s. c. 93 Am. Dec. 162; *London, etc., R. Co. v. Bartlett*, 7 Hurlst. & N. 400. Compare *Hayes v. Campbell*, 63 Cal. 143.

been convicted of larceny of goods from his principal.<sup>1</sup> But a telephone message from a railroad company to the owner of a tug boat, who is a common carrier, to send his boat to a certain place and transport hay from that place to another simply authorizes him to transport such hay as a common carrier and does not authorize him to bind the company by employing another tug owner to do the work.<sup>2</sup>

§ 1409. **Delivery must be for immediate shipment.**—Railroad companies are held to the liability of warehousemen, not to that of common carriers, for goods deposited with them otherwise than for immediate shipment. Thus, if the shipment is not to begin till further orders from the consignor, or something has been done by him, the carrier's liability attaches the instant, but not before, the orders have been given, or the something has been done.<sup>3</sup> If, however, the delay in shipment

<sup>1</sup> *Wilmington, etc., Co. v. Adams Exp. Co.*, 8 Houst. (Del.) 329, s. c. 32 Atl. R. 250.

<sup>2</sup> *Bleecker v. Satsop R. Co.*, 3 Wash. 77, s. c. 27 Pac. R. 1073.

<sup>3</sup> *Mt. Vernon Co. v. Alabama, etc., R. Co.*, 92 Ala. 296, 8 S. Rep. 687; *Barron v. Eldredge*, 100 Mass. 455; *O'Neill v. New York, etc., R. Co.*, 60 N. Y. 138; *St. Louis, etc. R. Co. v. Knight*, 122 U. S. 79; *Michigan S. R. v. Shurtz*, 7 Mich. 515; *Moses v. Boston, etc., R.*, 24 N. H. 71; *Rogers v. Wheeler*, 52 N. Y. 262; *Fitchburg, etc., R. Co. v. Hanna*, 6 Gray 539; *Wade v. Wheeler*, 3 Lans. 201; *Nichols v. Smith*, 115 Mass. 332; *Judson v. Western R. Co.*, 4 Allen 520; *McDonald v. Western R. Co.*, 34 N. Y. 497; *Blossom v. Griffin*, 13 N. Y. 569; *Pittsburg, etc., R. Co. v. Barrett*, 36 Ohio St. 448, 3 Am. & Eng. R. Cas. 256; *St. Louis, etc., R. Co. v. Montgomery*, 39 Ill. 335; *Lawrence v. Winona & St. P. Ry. Co.*, 15 Minn. 390; *Watts v. Boston & L. R. Co.*, 106 Mass. 466. But see *Michaels v. New York*

*R. Co.*, 30 N. Y. 564. The fact that the railroad company permitted a car of lumber, while waiting further orders from the shipper, to stand near a dry kiln in which a fire originated which destroyed the lumber, was not such negligence as would render it liable as warehouseman, since it was merely a gratuitous bailee, and the destruction of the car was not the natural and proximate consequence of the act complained of. *Basnight v. Atlantic & N. C. R. Co.*, 111 N. C. 592, 16 S. E. R. 323. In *St. Louis, etc., R. Co. v. Montgomery*, 39 Ill. 335, it was held that the company's liability was that of warehouseman only for goods already loaded which were damaged while being held at the company's request. Where a carrier, after informing the owner of goods delivered to it for transportation that they will be held at place of receipt till the freight charges are prepaid, ships the goods without payment, and without notice to the owner, it is liable for damages resulting from such prema-

is due, not to the request or default of the consignor, but to the exigencies of the railroad company's business or to its default, the carrier's liability usually dates from the deposit and not from the commencement of the journey. Thus, where goods bearing the consignee's name and address are delivered to a railroad company, without agreement to the contrary, the delivery is equivalent to an express order to ship immediately;<sup>1</sup> and the fact that the consignee consents that they may wait in the freight house because the company has no car ready, will not relieve it from liability as an insurer.<sup>2</sup>

§ 1410. Notice of delivery.—There must always be either actual or constructive notice of the deposit of goods for transportation. If the deposit is made in the usual manner at a place where goods have been constantly received for transportation, the railroad company may, it seems, be charged with constructive notice even though the delivery was not made to any of its servants.<sup>3</sup> But this is a doctrine to be carefully ap-

ture shipment. *Campion v. Canadian P. R. Co.*, 43 Fed. Rep. 775.

<sup>1</sup> Redfield on Railways, § 174; Schouler on Bailments, 381, ch. 4; *Clarke v. Needles*, 25 Pa. St. 338; *Randleson v. Murray*, 8 A. & E. 109; *Dale v. Hall*, 1 Wils. 281; *Blossom v. Griffin*, 13 N. Y. 569; *Williams v. Peytavin*, 4 Mart. (La.) 304; *Grand Tower, etc., Co. v. Ullman*, 89 Ill. 244; *Miriam v. Hartford & N. H. R. Co.*, 20 Conn. 354; *Trowbridge v. Chapin*, 23 Conn. 595; *Ford v. Mitchell*, 21 Ind. 54; *Gleason v. Goodrich Trans. Co.*, 32 Wis. 85; *O'Bannon v. Southern Ex. Co.*, 51 Ala. 481; *Grosvenor v. New York C. R. Co.*, 39 N. Y. 34; *Burrell v. North, 2 Car. & Kir.* 680; *London & L. F. I. Co. v. Rome, etc., R. Co.*, 23 N. Y. Sup. 231, 68 Hun 598; *Pittsburgh, etc., R. Co. v. Barrett*, 36 Ohio St. 448, 3 Am. & Eng. R. Cas. 256. But see *Ill. Cen. R. Co. v. Ashmead*, 58 Ill. 487; *Same v. McClellan*, 54 Ill. 58; *Same v. Hornberger*, 77 Ill. 457; in which

cases the company was held liable as warehouseman only for goods deposited on a platform with the understanding that they would be shipped as soon as cars and the permission of the military authorities could be had.

<sup>2</sup> *Witbeck v. Holland*, 45 N. Y. 13; *Shelton v. Merchants' D. T. Co.*, 36 N. Y. S. C. 527, 59 N. Y. 258; *Gregory v. Wabash Ry. Co.*, 46 Mo. App. 574.

<sup>3</sup> *Merriam v. Hartford, etc., R. Co.*, 20 Conn. 354; *Converse v. Norwich, etc., Trans. Co.*, 33 Conn. 166; *Evansville, etc., R. Co. v. Keith*, 8 Ind. App. 57, s. c. 35 N. E. R. 296. See *Green v. Milwaukee, etc., Railroad*, 38 Iowa 100, 41 Iowa 410, where the company was held liable for a trunk left by a drayman in the waiting-room, without notice, in accordance with an established custom. See, also, *Wright v. Caldwell*, 3 Mich. 51; *Packard v. Getman*, 6 Cowen 757; *O'Bannon v. Southern Ex. Co.*, 51 Ala. 481; *Bukman v. Levi*, 3 Camp. 414.

plied, and it has been held that leaving goods on a dock near a boat, in accordance with the usual custom, is not sufficient unless notice is given.<sup>1</sup> The general rule is that the carrier must have notice.<sup>2</sup>

§ 1411. **Place of delivery.**—Goods are usually delivered to railroad companies at established stations, and they may refuse to receive them at unusual places.<sup>3</sup> But the delivery may be sufficient

<sup>1</sup> *Packard v. Getman*, 6 Cow. (N. Y.) 757, s. c. 16 Am. Dec. 344, and note.

<sup>2</sup> *Leigh v. Smith*, 1 Car. & P. 638; *Grosvenor v. New York, etc., R. Co.*, 39 N. Y. 34; *Basnight v. Atlantic, etc., R. Co.*, 111 N. Car. 592, s. c. 16 S. E. R. 323. "And it must be admitted that the doctrine of constructive delivery without notice to the carrier is one which should be applied with great caution. It is undoubtedly competent for him to bind himself by such a delivery either by his express agreement that a deposit of goods at a particular place shall be a valid delivery to him, or by so advertising it to the public, or by a well known and established custom to receive the goods in that way, which would perhaps be as binding upon him as to persons who had acted upon the notice or the usage as an express agreement; and cases may arise in which the usage and course of dealing between the parties should undoubtedly have that effect. But, certainly, to do so they should be shown to have existed and to have been uniformly acted upon by the parties, by the most satisfactory proof and for a sufficient length of time to have become an established usage, tantamount to an agreement to that effect or to a declaration to the public that a delivery in accordance with the usage will be deemed an acceptance by him for the purpose of the transportation; and perhaps it should be shown that

a reliance upon the previous course of dealing or the usage or the notice had controlled the action of the shipper in the particular instance." *Hutchinson on Carriers*, (2nd. ed.) § 93. *Little Rock, etc., R. Co. v. Hunter*, 42 Ark. 200; *Selway v. Holloway*, 1 Ld. Rayd. 46; *Lovett v. Hobbs*, 2 Show. 127; *Leigh v. Smith*, 1 C. & P. 638; *Hickox v. Naugatuck, etc., R. Co.*, 31 Conn. 231; *Pittsburg, C. & St. L. R. Co. v. Barrett*, 36 Ohio St. 448, 3 Am. & Eng. R. Cas. 256; *Salinger v. Simmons*, 57 Barb. (N. Y.) 513.

<sup>3</sup> *Kellogg v. Suffolk, etc., R. Co.*, 100 N. C. 158, 35 Am. & Eng. R. Cas. 529; *Chicago, etc., A. R. Co. v. Flagg*, 43 Ill. 364; *State v. New Haven, etc., Co.*, 41 Conn. 134. While a carrier is not liable for failing to furnish cars or to transport goods, unless offered at a usual or designated place for receiving freight, yet where goods are placed at a station upon the line of a railroad to be transported, the refusal of the carrier, upon demand, to furnish cars for the transportation of the property relieves the owner from making any further delivery or offer to deliver. *Louisville, etc., R. Co. v. Godman*, 104 Ind. 490; *Louisville, etc., R. Co. v. Flanagan*, 113 Ind. 488, 32 Am. & Eng. R. Cas. 532. In *Wells v. Wilmington, etc., Railroad*, 6 Jones L. 47, it was held that the defendant was not liable for goods lost in consequence of the train's failure to stop for them at the roadside

although, made at an unusual place to an authorized agent,<sup>1</sup> and accepted by him, or, under some circumstances, even if made at a place not an established station but where the company has habitually received freight. Thus where a railroad company had erected a platform on which, in the usual course of business, cotton was stored for shipment by the next train, it was held that the shipper could recover as from a carrier for cotton stored on such platform and destroyed by fire set by one of the company's locomotives.<sup>2</sup> A like decision was rendered where goods were placed on a depot platform for shipment, in accordance with the usual custom, with the knowledge of the carrier's agent, and were set on fire by a boy who was playing on the platform and could have been seen by the agent from his office in the depot.<sup>3</sup> And where it was the custom to deposit cotton in the street beside the railroad company's platform or in the company's cotton yard, a delivery there was held sufficient.<sup>4</sup> But loading goods on a car standing on a

where they had been placed in reliance on the conductor's promise that he would stop there for them. The facts that a mail train stopped regularly at a certain place to deliver mail and that the place was set down in circulars and orders of the company as a station, do not necessarily make such place a regular station for the reception of freight within N. C. Code, 1964. *Land v. Wilmington & W. R. Co.*, 104 N. C. 48, 10 S. E. R. 80, 40 Am. & Eng. R. Cas. 18. Neither is a point on a railroad where there was never any station agent, no agent's office, nor books kept, tickets sold, or bills of lading given, but where conductors had frequently stopped trains to receive and let off freight and passengers, a regular station within the meaning of the same law. *Kellogg v. Suffolk & C. R. Co.*, 100 N. C. 158, 5 S. E. R. 379; 35 Am. & Eng. R. Cas. 529.

<sup>1</sup>*Cronkite v. Wells*, 32 N. Y. 247; *Blanchard v. Isaacs*, 3 Barb. 388; *Dwight v. Brewster*, 1 Pick. 50; *Mis-*

*souri, etc. R. Co. v. Hannibal, etc., Railroad*, 35 Mo. 84.

<sup>2</sup>*Meyer v. Vicksburg, S. & P. R. Co.*, 41 La. Ann. 639, 6 So. Rep. 218. "But a place on a line of railroad where there is a switch, but neither agent, station, nor platform, and where shipments are made only by loading on the cars, and where freight is delivered when parties are ready to receive the same, is not a depot, and a deposit of cotton near such switch does not constitute such a delivery to the company, as to render it thereafter liable as a common carrier. *Kansas City, M. & B. R. Co. v. Lilly*, (Miss.) 8 So. R. 644, 45 Am. & Eng. R. Cas. 379. See *Missouri P. R. Co. v. Douglass*, 2 Tex. App. (Civ. Cas.) 32, 16 Am. & Eng. R. Cas. 98.

<sup>3</sup>*Ft. Worth, etc., R. Co. v. Martin*, (Tex. Civ. App.) 35 S. W. R. 21. See, also, *Evansville, etc., R. Co. v. Keith*, 8 Ind. App. 57, s. c. 35 N. E. R. 296.

<sup>4</sup>*Montgomery, etc., Ry. Co. v. Kolb*, 73 Ala. 396. See, also, *Wright v. Caldwell*, 3 Mich. 51.

side track is not a sufficient delivery to the company, where there is no custom to that effect and the company's agent, upon being notified, refuses to receive and ship them.<sup>1</sup>

§ 1412. **Delivery to connecting carrier.**—The liability of a connecting carrier does not attach, and the duty of the first carrier is not fully performed, until there has been an actual delivery to the connecting carrier, or notice under such circumstances as, according to usage, contract, or the course of business, will constitute a constructive delivery.<sup>2</sup> Thus, it is not a good delivery to the connecting carrier, in the absence of some special agreement or custom, to merely store the goods in a warehouse at the end of the route.<sup>3</sup> And where a freight car is to be transported over connecting lines, the liability of the connecting carrier does not begin until the car is transferred to it.<sup>4</sup> So, it has been held that merely placing a car on the side track of the connecting carrier, without giving the latter any notice or directions, and without marking it with the name and address of the consignee, is not a sufficient delivery to establish a contract relation between the carriers and make the latter liable as a common carrier to the former.<sup>5</sup> It may be said, in general, that the rules in regard to delivery by one carrier to another are substantially the same as those which govern the delivery by a shipper to a carrier.<sup>6</sup> But a

<sup>1</sup> *Yoakum v. Dryden*, (Tex. Civ. App.) 26 S. W. R. 312. See, also, *Kansas City, etc., R. Co. v. Lilly*, (Miss.) s. c. 8 So. R. 644.

<sup>2</sup> *Post*, § 1443. But it is held that an action for failure to deliver to a connecting line will not lie where the two lines are not connected for that purpose and there is no agent at the junction of the two roads. *St. Louis, etc., R. Co. v. Marrs*, 60 Ark. 637, 31 S. W. R. 42. See, also, *Shelbyville R. Co. v. Louisville, etc., R. Co.*, 82 Ky. 541.

<sup>3</sup> *Irish v. Milwaukee, etc., R. Co.*, 19 Minn. 376, s. c. 18 Am. R. 340;

*Railroad Co. v. Manufacturing Co.*, 16 Wall. (U. S.) 318; note to *Wells v. Thomas*, 72 Am. Dec. 228, 237, 238. *Post*, § 1443. But compare *Peoria, etc., R. Co. v. United States, etc., Co.*, 136 Ill. 643.

<sup>4</sup> *Rome R. Co. v. Sloan*, 39 Ga. 636. See, also, *Gass v. New York, etc., R. Co.*, 99 Mass. 220, s. c. 96 Am. Dec. 742.

<sup>5</sup> *Mt. Vernon Co. v. Alabama, etc., Co.*, 92 Ala. 296; *Kentucky, etc., Insurance Co. v. Nashville, etc., R. Co.*, 8 Baxt. 268.

<sup>6</sup> *Shelbyville R. Co. v. Louisville, etc., R. Co.*, 82 Ky. 541.

mere constructive delivery, which is good as between the two carriers, according to their usage, or a special contract between them, may not be sufficient to bind the shipper and deprive him of recourse upon the initial carrier.<sup>1</sup> Evidence of a well-established, general and uniform custom is generally admissible, even as against the shipper, where there are no special directions, or the like.<sup>2</sup> And the usage or usual course of dealing between connecting carriers in regard to the delivery and receipt of freight may be shown, in such a case, as between themselves.<sup>3</sup>

**§ 1413. Evidence of delivery.**—It has been held that whether freight has been delivered to a common carrier, so as to fix his liability as such, is a mixed question of law and fact, and that delivery may be shown by proving that the freight was sent to the place where the carrier was accustomed to receive such freight, and that notice was duly given that it was there for transportation.<sup>4</sup> The burden of proving the delivery is upon the plaintiff.<sup>5</sup> The fact that a bill of lading has been issued by the carrier is *prima facie* but not conclusive evidence of delivery.<sup>6</sup> Thus, in a recent case<sup>7</sup> it appeared that a compress company was in the habit of receiving cotton at its sheds, and that a railroad company had not only contracted with it

<sup>1</sup> Conkey v. Milwaukee, etc., R. Co., 31 Wis. 619, s. c. 11 Am. R. 630; Condon v. Marquette, etc., R. Co., 55 Mich. 218, s. c. 54 Am. R. 367; McDonald v. Western, etc., R. Co., 34 N. Y. 497; Rawson v. Holland, 59 N. Y. 611; Merriam v. Hartford, etc., R. Co., 20 Conn. 354, s. c. 52 Am. Dec. 344.

<sup>2</sup> Van Santvoord v. St. John, 6 Hill (N. Y.) 157; Converse v. Norwich, etc., Co., 33 Conn. 166; Pratt v. Railway Co., 95 U. S. 43; Ray Neg. of Imposed Duties, (Carriers of Freight) 384, 385; Hutchinson on Carriers, § 104. See, also, Melbourne v. Louisville, etc., R. Co., 88 Ala. 443, s. c. 6 So. R. 762.

<sup>3</sup> Root v. Great Western R. Co., 65 Barb. (N. Y.) 619; Michigan Cent. R.

Co. v. Curtis, 80 Ill. 324; Gulf, etc., R. Co. v. Insurance Co., (Tex.) 28 S. W. R. 237. See, also, Evansville, etc., R. Co. v. Keith, 8 Ind. App. 57, 35 N. E. R. 296; Blanchard v. Isaacs, 3 Barb. (N. Y.) 388; Lawson's Usages and Customs, § 79.

<sup>4</sup> Bowie v. Baltimore, etc., R. Co., 1 McArthur (D. C.) 609. See Nichols v. Smith, 115 Mass. 332.

<sup>5</sup> Louisville, etc., R. Co. v. Echols, 97 Ala. 556, s. c. 12 So. R. 304; Canfield v. Baltimore, etc., R. Co., 14 J. & S. (N. Y.) 238.

<sup>6</sup> Post, § 1419.

<sup>7</sup> St. Louis, etc., R. Co. v. Commercial, etc., Ins. Co., 139 U. S. 223, s. c. 11 Sup. Ct. R. 554.



to transport all cotton brought by the owners to the sheds of the compress company, but was also in the habit of issuing bills of lading to the owners, upon their request, in exchange for the receipts of the express company, but this was for the mere convenience of all parties and without any intention of making any change in the actual or legal custody of the cotton while in the sheds. The court held that the railroad company was not liable for the loss of the cotton by fire while in the sheds, although it had accumulated therein by reason of the delay of such company in furnishing transportation.<sup>1</sup> We have already considered what is sufficient evidence to constitute a complete delivery and the competency and effect of evidence of custom upon the question, and a further consideration of the subject seems unnecessary in this connection.

§ 1414. **Delivery to carrier passes title to consignee.**—We shall elsewhere consider the right of stoppage *in transitu* and the relative rights of the consignor and consignee in that connection, but it may be well at this place to state generally the effect of delivery to the carrier upon the title to the goods delivered. The effect of such delivery, of course, depends very largely upon the intention of the parties, which is usually determined by the contract in each particular case, but, as a general rule, in the absence of any agreement to the contrary, delivery to the carrier is delivery to the consignee.<sup>2</sup> So, where the seller agrees to deliver goods “f. o. b.” at a certain place, after their arrival at that place it has been held

<sup>1</sup> To the same effect is *St. Louis, etc., R. Co. v. Knight*, 122 U. S. 79, s. c. 7 Sup. Ct. R. 1132. See, also, *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, s. c. 10 Sup. Ct. R. 365.

<sup>2</sup> *Mann v. Glauber*, 96 Ga. 795, s. c. 22 S. E. R. 405; *Meyer, etc., Drug Co. v. McMahan*, 50 Mo. App. 18; *Whitman, etc., Co. v. Strand*, 8 Wash. 647, s. c. 36 Pac. R. 682; *Leggett, etc., Co. v. Collier*, 89 Iowa 144, s. c. 56 N. W. R. 417; *Pilgreen v. State*, 71 Ala. 368;

*State v. Carl*, 43 Ark. 353, s. c. 51 Am. R. 565; *Magruder v. Gage*, 33 Md. 344, s. c. 3 Am. R. 177; *Johnson v. Stoddard*, 100 Mass. 306; *Sarbecker v. State*, 65 Wis. 171, s. c. 56 Am. R. 624; *Kessler v. Smith*, 42 Minn. 494; *Pennsylvania Co. v. Holderman*, 69 Ind. 18; *Richtin v. McGary*, 117 Ind. 132; *Garbracht v. Com.*, 96 Pa. St. 449, s. c. 42 Am. R. 550; *Benj. on Sales*, (6th Am. ed.) § 693.

that the carrier ceases to be the agent of the consignor and becomes the agent of the consignee, and the former can not maintain an action against the carrier for injuries to them after their arrival and before they are unloaded.<sup>1</sup> It has also been held that the reservation of the right to test the goods does not prevent the title from passing upon their delivery to the carrier where, in accordance with a long course of dealing between the parties, the goods are credited to the seller before delivery to the buyer and as soon as bills are received therefor, with the understanding that the purchaser should be given credit for such as he might return as unsatisfactory after testing them.<sup>2</sup> But where the seller undertakes to deliver the goods himself at the buyer's place of business and selects his own carrier the carrier is usually regarded as the agent of the seller, who thus assumes the risks of carriage,<sup>3</sup> and so where the sale is conditional upon payment on or before delivery, or the like, the mere delivery to the carrier before the condition precedent is performed will not ordinarily pass the title to the purchaser.<sup>4</sup>

<sup>1</sup> *Capehart v. Furman, etc., Co.*, (Ala.) 16 So. R. 627.

<sup>2</sup> *Wind v. Iler*, (Iowa) 61 N. W. R. 1001. To same effect, see *Foley v. Felrath*, 98 Ala. 176, s. c. 13 So. R. 485; *Boothby v. Plaisted*, 51 N. H. 436, s. c. 12 Am. R. 140.

<sup>3</sup> *Devine v. Edwards*, 101 Ill. 138; *Falvey v. Richmond*, 87 Ga. 99; *Murray v. Nichols, etc., Co.*, 11 N. Y. Supp. 734; *Dunlop v. Lambert*, 6 C. & F. 600; *Coombs v. Bristol, etc., R. Co.*,

3 H. & N. 1. See, also, *Sohn v. Jervis*, 101 Ind. 578.

<sup>4</sup> *Merchants' Exch. Bank v. McGraw*, 59 Fed. R. 972; *Russell v. Minor*, 22 Wend. (N. Y.) 659; *Hammett v. Linneman*, 48 N. Y. 399; *Sneathen v. Grubbs*, 88 Pa. St. 147; *Bonner v. Marsh*, 10 Smed. & M. (Miss.) 376, s. c. 48 Am. Dec. 754. See, also, *Suit v. Woodhall*, 113 Mass. 391. But compare *Farmers', etc., Co. v. Gill*, 69 Md. 537, s. c. 9 Am. St. R. 443.

## CHAPTER LVII.

### BILLS OF LADING.

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| <p>§ 1415. Definition—Two-fold character.</p> <p>1416. Power of agent to issue bills of lading.</p> <p>1417. Execution of bills of lading.</p> <p>1418. Premature issuance of bill.</p> <p>1419. Bills of lading as evidence of receipt of goods—<i>Bona fide</i> purchasers.</p> <p>1420. As evidence of condition, weight, or contents.</p> <p>1421. As evidence of value.</p> <p>1422. Misdescription in bill.</p> <p>1423. As evidence of contract—Not variable by parol.</p> <p>1424. Construction of bills of lading.</p> | <p>§ 1425. Construction of particular words and phrases.</p> <p>1426. As muniments of title—Delivery by carrier.</p> <p>1427. Effect of direction in bill of lading to notify some designated person.</p> <p>1428. Bills of lading assignable but not negotiable.</p> <p>1429. Rights of <i>bona fide</i> purchasers and other third persons who hold bills of lading.</p> <p>1430. Duplicate bills.</p> <p>1431. Change of consignment by shipper.</p> |
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§ 1415. Definition—Two-fold character.—A bill of lading is “a written acknowledgment by the common carrier of the receipt of certain goods and an agreement, for a consideration, to transport and to deliver the same at a specified place to a person therein named or his order,”<sup>1</sup> and any instrument passing from the carrier to the shipper bearing these characteristics is effective as a bill of lading, no matter what its name or form.<sup>2</sup> The bill of lading is not necessary to establish the lia-

<sup>1</sup> Bouv. Law Dict., 246. For other definitions of bills of lading, see 2 Am. & Eng. Encyc. of L. 223; The Delaware, 14 Wall. (U. S.) 579; Cope v. Cordova, 1 Rawle (Pa.) 203; Freeman v. Kraemer, (Minn.) 65 N. W. R. 455; Union R. Co. v. Yeager, 34 Ind. 1; Empire T. Co. v. Wallace, 68 Pa. St. 302; Merchants' Bank v.

Hewitt, 3 Iowa 93; Covill v. Hill, 4 Denio (N. Y.) 323.

<sup>2</sup> There have been attempts to discriminate between bills of lading given by carriers by water and what are sometimes called “shipping receipts,” given by carriers by land, but it is established that their effect is the same. In Freeman v. Kraemer, (Minn.)

bility of the common carrier, for his liability usually begins with the completion of the delivery of the goods, whether a bill of lading has or has not been issued;<sup>1</sup> but this common law liability is generally qualified and limited by the bill of lading, which serves the double purpose of receipt and contract, although the limitations in the bill of lading can not relieve the railroad company of the character of a common carrier.<sup>2</sup> In its two-fold character of receipt and contract the bill of lading is subject to different rules of construction. In so

65 N. W. R. 455, the court said: "These instruments consist each of a receipt for the goods, and an agreement to transport them to a certain place, and in our opinion are bills of lading." Hutchinson also says, on the same subject: "They are, however, the same in effect, and are intended merely to evidence the true intent of the transaction between the parties. In both cases they contain a description of the goods, an acknowledgment that they have been received by the carrier, the names of the shipper and consignee, the place of consignment, that they are in good condition, the terms of the carriage and such qualifications of the liability of the carrier as he and the shipper may have agreed upon, and the contract to carry to destination and there deliver to the consignee. They must be signed by the carrier or his authorized agent to bind him, and must be accepted by the shipper. And any contract with the carrier having these characteristics is entitled to the effect of a bill of lading, no matter how informally it may be drawn." Hutchinson on Carriers, (2d ed.) § 120. See, also, Lawson on Carriers, § 112; Baltimore, etc., R. Co. v. Wilkens, 44 Md. 11, s. c. 22 Am. Rep. 26; Union R. Co. v. Yeager, 34 Ind. 1.

<sup>1</sup> Pollard v. Vinton, 105 U. S. 7. A parol contract is as effective as a bill

of lading. Texas Pacific R. Co. v. Nicholson, 61 Tex. 491, 21 Am. & Eng. R. Cas. 133; Mobile, etc., R. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. R. 566. "We know no rule of the common law, and no provision of statute, which requires a railroad company to give bills of lading. \* \* \* Nor is there any rule of law requiring a consignor to take out a bill of lading and send it to the consignee." Johnson v. Stoddard, 100 Mass. 306. In some states, however, the carrier is compelled by statute to issue bills of lading when requested to do so. See Texas & P. R. Co. v. Kuteman, 79 Tex. 465, 14 S. W. Rep. 1069, where it was held that under the Texas statute, imposing a penalty on common carriers for refusing to give, when demanded, a bill of lading stating "the quantity, character, and condition of the goods" received for transportation, a railroad company incurs the penalty by giving a bill of lading for lumber, describing it merely as "a car-load," when the shipper demands that the weight be stated. But see Missouri, etc., R. Co. v. Douglas, 2 Tex. App. (Civ. Cas.) 32, 16 Am. & Eng. R. Cas. 98, where it is held that the liability is only that of warehouseman until the bill of lading is signed.

<sup>2</sup> See discussion in Railroad Co. v. Lockwood, 17 Wall. 357, 376, and authorities cited therein.

far as it is merely a receipt, either party may explain or contradict it by parol, but as a contract it must be construed according to its terms.<sup>1</sup> Bills of lading answer a different purpose and perform functions different from those of bills of exchange and promissory notes. The former are symbols of ownership of the goods they cover, and are not negotiable as commercial paper. While commonly used as security for loans and advances, they are so used only as evidence of ownership, special or general, of the property mentioned in them, and of the right to receive such property at the place of delivery.<sup>2</sup>

§ 1416. **Power of agent to issue bills of lading.**—The railroad company in its capacity of common carrier is bound by the acts and contracts of its agents so long as they are acting within the scope of their authority and it is also held to be bound by the knowledge thus obtained by such agents.<sup>3</sup> It is held in some jurisdictions that the true limit of a railway agent's authority to bind his company, as between the company and a third person, is the apparent authority with which he is invested and which he is known to exercise, and that a fraudulent bill of lading issued by a duly accredited agent binds the company if found in the hands of a *bona fide* purchaser, the company being estopped to deny the facts there set out.<sup>4</sup> The

<sup>1</sup> Long v. New York, etc., R. Co., 50 N. Y. 76; Louisville, etc., R. Co. v. Wilson, 119 Ind. 352, 21 N. E. R. 341; Snow v. Indiana, etc., R. Co., 109 Ind. 422; Tebbits v. Rock Island, etc., R. Co., 49 Ill. App. 567; Wayland v. Mosely, 5 Ala. 430; McTyer v. Steele, 26 Ala. 487; Louisville, etc., R. Co. v. Fulgham, 91 Ala. 555, 8 So. R. 803; Central, etc., R. Co. v. Hasselkus, 91 Ga. 382, 17 S. E. Rep. 838; Little Rock, etc., R. Co. v. Hall, 32 Ark. 669; Richmond, etc., R. Co. v. Shomo, 90 Ga. 496; Merchants', etc., Co. v. Furthmann, 149 Ill. 66; The Delaware, 14 Wall. 579, and cases cited.

<sup>2</sup> Friedlander v. Texas & Pacific R. Co., 130 U. S. 416, 40 Am. & Eng. R.

Cas. 70; Baltimore, etc., R. Co. v. Wilkens, 44 Md. 11; Douglas v. People's Bank, 86 Ky. 176, 5 S. W. R. 420; Bank of Batavia v. New York, etc., R. Co., 106 N. Y. 195, 12 N. E. R. 433; Missouri, etc., R. Co. v. Heidenheimer, 82 Tex. 195, 17 S. W. R. 608; Shaw v. Railroad Co., 101 U. S. 557.

<sup>3</sup> Harmon v. New York, etc., R. Co., 28 Barb. (N. Y.) 323. But see Missouri, etc., R. Co. v. Belcher, (Tex.) 35 S. W. R. 6.

<sup>4</sup> Brooke v. New York, etc., R. Co., 108 Pa. St. 529, 1 Atl. R. 206; Sioux City, etc., R. Co. v. First Nat. Bank, 10 Neb. 556; Wichita Savings Bank v. Atchison, etc., R. Co., 20 Kan. 519; *ante*, § 303 and note on p. 415; *post*,

weight of authority, however, seems to sustain the view that an agent can not bind the company by issuing a bill of lading where no goods are received.<sup>1</sup> Where the transaction is in good faith, however, the express authority of the agent need not appear if he receives the goods in the proper place and is in possession of the company's stamps to be used on bills of lading.<sup>2</sup> It has been held that the position of one authorized to make contracts for carriage is one of special trust and confidence, and that a bill of lading signed by a substitute is not valid,<sup>3</sup> but it seems to us that this view is questionable as the necessities of commerce may often require the agent to delegate his authority temporarily, otherwise there might be times when traffic from particular stations might be entirely suspended. A general freight agent has power to authorize others to sign bills of lading in his own name and bills so signed are binding upon the principal,<sup>4</sup> whenever they would have bound the principal if signed by the general agent in his own proper person. The subject of the authority of agents to receive freight and execute bills of lading or other contracts for transportation beyond their own lines is fully treated elsewhere.<sup>5</sup>

**§ 1417. Execution of bills of lading.**—Bills of lading are usually on printed forms and signed only by the carrier or his agent.<sup>6</sup> Generally the acceptance of the bill by the shipper or

§ 1419. See, also, *Bank of Batavia v. New York, etc., R. Co.*, 106 N. Y. 195, 12 N. E. R. 433.

<sup>1</sup> *Baltimore, etc., R. Co. v. Wilkens*, 44 Md. 11; *Stone v. Wabash, etc., R. Co.*, 9 Brad. (Ill.) 48; *Hunt v. Mississippi, etc., R. Co.*, 29 La. Ann. 446; *Union, etc., R. Co. v. Yeager*, 34 Ind. 1; *Ryder v. Hall*, 7 Allen (Mass.) 456; *Friedlander v. Texas, etc., R. Co.*, 130 U. S. 416; *Pollard v. Vinton*, 105 U. S. 7; *ante*, § 303 and note on page 414; *post*, § 1419, where many other authorities are cited.

<sup>2</sup> "No other proof of agency is neces-

sary than that the agent's acts justify the party dealing with him in believing that he had authority." *Hansen v. Flint, etc., R. Co.*, 73 Wis. 346, 41 N. W. R. 529, citing *Kasson v. Noltner*, 43 Wis. 646.

<sup>3</sup> *Pendall v. Rench*, 4 McLean (U. S.) 259.

<sup>4</sup> *Bennitt v. The Guiding Star*, 53 Fed. R. 936.

<sup>5</sup> *Ante*, §§ 1405, 1406; *post*, § 1437.

<sup>6</sup> Where the bill is made out by the shipper, his assent to it will be presumed. *Lawrence v. New York, etc., R. Co.*, 36 Conn. 63. Where the re-

his agent<sup>1</sup> is, at least in the absence of fraud, deceit, or mistake, conclusive evidence of his assent to its conditions.<sup>2</sup> This subject will be more fully treated when we come to consider contracts limiting the common law liability of the carrier. It may be well to add, however, in this connection, that, unless required by statute, the bill of lading need not be signed by the shipper,<sup>3</sup> and that the contract may even rest in parol.<sup>4</sup> In-

ceipt for goods is taken from a book of blank forms by the shipper and filled in by him, he is presumed to know all stipulations therein contained as to the company's liability for loss or injury to the goods. *Durgin v. American Exp. Co.*, 66 N. H. 277, 20 Atl. R. 328. Whether it is signed by the carrier or not is a question of fact for the jury to determine. *Royal Canadian Bank v. Grand Trunk R. Co.*, 23 Upper Can. C. P. 225.

<sup>1</sup>Where the owner leaves goods with an agent to be shipped, he will be bound by the agent's contract with the carrier, though the carrier knew who the owner was. *Jennings v. Grand Trunk Ry. Co.*, 5 N. Y. Supp. 140, 52 Hun 227, affirmed on appeal in 127 N. Y. 438.

<sup>2</sup>*Kellerman v. Kansas City, etc., R. Co.*, (Mo.) 34 S. W. R. 41; *Zimmermer v. New York Central, etc., R. Co.*, 137 N. Y. 460, s. c. 33 N. E. R. 642; *Steel v. Townsend*, 37 Ala. 247; *Steamboat "Emily" v. Karney*, 5 Kan. 645; *Mulligan v. Illinois R. Co.*, 36 Iowa 181; *Robinson v. Merchants' D. T. Co.*, 45 Iowa 470; *Hoadly v. Northern Transp. Co.*, 115 Mass. 305; *Cincinnati, etc., R. Co. v. Pontius*, 19 Ohio St. 221; *Dillard v. Louisville R. Co.*, 2 Lea (Tenn.) 288; *Farnham v. Camden, etc., R. Co.*, 55 Pa. St. 53; *Mobile & O. R. Co. v. Weiner*, 49 Miss. 725; *Maghee v. Camden & A. R. Co.*, 45 N. Y. 514; *Germania F. I. Co. v. Memphis & C. R. Co.*, 72 N. Y. 90; *Newman v. Smoker*, 25 La. Ann. 303. See, *post*,

§ 1423. As to acceptance of bills by agents see *Knell v. United States & B. S. Co.*, 1 Jones & S. (23 N. Y. S. C.) 423; *Nelson v. Hudson R. R. Co.*, 48 N. Y. 498; *York Co. v. Central R. Co.*, 3 Wall. (U. S.) 107; *Grace v. Adams*, 100 Mass. 505. According to some of the decisions in Massachusetts, Illinois, Georgia, Michigan, Maryland, Mississippi, Ohio and Wisconsin, it seems assent must be affirmatively shown. *Buckland v. Adams Ex. Co.*, 97 Mass. 124; *Perry v. Thompson*, 98 Mass. 249; *Boorman v. American Ex. Co.*, 21 Wis. 153; *White v. Goodrich, etc., Co.*, 46 Wis. 493; *Merchants' D. T. Co. v. Joesting*, 89 Ill. 152; *Wallace v. Sanders*, 42 Ga. 486; *American T. Co. v. Moore*, 5 Mich. 368, 7 Am. Law Reg. (O. S.) 352; *Michigan Cent. R. Co. v. Hale*, 6 Mich. 243; *Baltimore & O. R. Co. v. Brady*, 32 Md. 333; *McCoy v. Erie & W. T. Co.*, 42 Md. 498; *Gaines v. Union T. Co.*, 28 Ohio St. 418. See, *post*, § 1502. As to consignors' agents in these states, see *Falvey v. Northern Transp. Co.*, 15 Wis. 129; *Fillibrown v. Grand Trunk R. Co.*, 55 Me. 462.

<sup>3</sup>*Piedmont, etc., Co. v. Columbia, etc., R. Co.*, 19 S. Car. 353, s. c. 16 Am. & Eng. R. Cas. 194; *Cincinnati, etc., R. Co. v. Pontius*, 19 Ohio St. 221; *Adams Exp. Co. v. Haynes*, 42 Ill. 89. But see, under the Dakota statute, *Hartwell v. Northern Pac. Exp. Co.*, 5 Dak. 463, s. c. 41 N. W. R. 732, 3 L. R. A. 342.

<sup>4</sup>*Roberts v. Riley*, 15 La. Ann. 103; *Missouri, etc., R. Co. v. Carter*, (Tex.

deed, the complete delivery of goods, properly directed, which the carrier is required by law to accept and carry is generally sufficient to render the company responsible for their transportation in accordance with its common law duties. The execution of a bill of lading by the carrier with a blank left for the name of the consignee, has been held to be equivalent to a contract to deliver to the consignor or his assignee,<sup>1</sup> and where two papers are executed together as a bill of lading, one party signing one, and the other party signing the other, both should be construed together as constituting the entire contract.<sup>2</sup>

§ 1418. **Premature issuance of bill.**—If a bill of lading, through inadvertance or otherwise, be signed before the goods are actually shipped, and afterwards certain goods are delivered to the carrier as and for the goods receipted for, the bill may operate on those goods as between the shipper and the carrier by way of relation and estoppel.<sup>3</sup> But, although a bill of lading has been issued acknowledging the receipt of the goods the company may, at least as between the parties, show that they have not been delivered to it, if such is the fact.<sup>4</sup> In some of the states it is provided by statute that no bill of lading shall be issued until the goods are actually delivered to the carrier. It has been held, under such a statute, that a bill of lading reciting that the goods have been received for transportation when they have not been received and are in fact in possession of another company is void.<sup>5</sup>

Civ. App.) 29 S. W. R. 565; Louisville, etc., R. Co. v. Craycraft, 12 Ind. App. 203, s. c. 39 N. E. R. 523; Mobile, etc., R. Co. v. Jurey, 111 U. S. 584, s. c. 4 Sup. Ct. R. 566.

<sup>1</sup>Garden Grove Bank v. Humeston, etc., R. Co., 67 Iowa 526, s. c. 25 N. W. R. 761.

<sup>2</sup>Richmond, etc., R. Co. v. Shomo, 90 Ga. 496.

<sup>3</sup>Rowley v. Bigelow, 12 Pick. (Mass.) 307; The Delaware, 14 Wall. (U. S.) 579; The Idaho, 93 U. S. 575; The

Bark Edwin, 1 Sprague (U. S. Dist.) 477.

<sup>4</sup>Post, § 1419. So, according to the weight of authority, even as against third persons, where the company has done nothing to mislead them or create an estoppel. Post, § 1419.

<sup>5</sup>Etna Nat. Bank v. Water Power Co., 58 Mo. App. 532. See, also, Stone v. Wabash, etc., R. Co., 9 Ill. App. 48; Martin v. Railway Co., 55 Ark. 510, s. c. 19 S. W. R. 314.



§ 1419. **Bills of lading as evidence of receipt of goods.—****Bona fide purchasers.**—Bills of lading are only *prima facie* evidence between the original parties that the goods have actually come into the carrier's custody, and like other receipts are open to explanation, modification or contradiction by parol.<sup>1</sup> The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver.<sup>2</sup> And so it is held that a recovery can not be had even by an innocent and *bona fide* holder for value against a common carrier for goods never actually in its possession for transportation, though one of its agents, with authority to sign bills of lading, had, through fraud, mistake or negligence, issued a bill of lading.<sup>3</sup> While

<sup>1</sup>Ellis v. Willard, 9 N. Y. 529; Berkeley v. Watling, 7 Ad. & El. 29; Meyer v. Peck, 28 N. Y. 590; White v. Van Kirk, 25 Barb. (N. Y.) 16; The Delaware, 14 Wall. 579; The Lady Franklin, 8 Wall. 325; Van Etten v. Newton, 134 N. Y. 143, s. c. 31 N. E. R. 334; Abbe v. Eaton, 51 N. Y. 410; National Bank v. Walbridge, 19 Ohio St. 419; Dean v. King, 22 Ohio St. 118; Wood v. Perry, 1 Wright (Ohio) 240; The Loon, 7 Blatch. 244; Southern Ex. Co. v. Hess, 53 Ala. 19; Northern Transp. Co. v. McClary, 66 Ill. 233; Brouty v. Five, etc., Elm Staves, 21 Fed. Rep. 590; Southern Ex. Co. v. Craft, 49 Miss. 480; Fellows v. Steamer Powell, 16 La. Ann. 316; Jones v. Walker, 5 Yerger (Tenn.) 427; Hunt v. Mississippi Cent. R. Co., 29 La. Ann. 446; Flower v. Downs, 12 Rob. (La.) 101; Baltimore, etc., R. Co. v. Wilkens, 44 Md. 11; Louisiana Bank v. Laveille, 52 Mo. 380; Kirkman v. Bowman, 8 Rob. (La.) 246; Cox v. Peterson, 30 Ala. 608; Peck v. Dinsmore, 4 Porter (Ala.) 212; Wayland v. Mosely, 5 Ala. 430; Wetzler v. Collins, 70 Me. 290; O'Brien v. Gilchrist, 34 Me. 554; Cafiero v. Welsh, 8 Phila. (Pa.) 130. It is com-

petent for the carrier to show that the shipper had no such goods as those receipted for, or that, having the goods, they were never delivered to the carrier. 2 Am. & Eng. Encyc. of L. 224, citing, among other cases, Hubbersty v. Ward, 8 Ex. 330; Sears v. Wingate, 3 Allen (Mass.) 103; Baltimore, etc., R. Co. v. Wilkens, 44 Md. 11; Hunt v. Mississippi, etc., R. Co., 29 La. Ann. 446. It is no objection to the bill as evidence that it acknowledges the receipt of other goods in addition to those concerning which the suit is brought. Wallace v. Vigus, 4 Blackf. (Ind.) 260. A railroad company is not precluded from denying the receipt of the goods, it having accepted a warehouse receipt as evidence of the shipper's goods, in the faith that they would be delivered. Hazard v. Illinois C. R. Co., 67 Miss. 32, 7 So. R. 280, 42 Am. & Eng. R. Cas. 455.

<sup>2</sup>Pollard v. Vinton, 105 U. S. 7; St. Louis, etc., Ry. Co. v. Knight, 122 U. S. 79; Baltimore, etc., R. Co. v. Wilkens, 44 Md. 11; Miller v. Hannibal, etc., R. Co., 90 N. Y. 430.

<sup>3</sup>National Bank v. Chicago, B. & N. R. Co., 44 Minn. 224, s. c. 46 N. W.

this view has the weight of authority the contrary is maintained in some of the states.<sup>1</sup> And it is held in Alabama that the carrier is liable to a *bona fide* purchaser of a bill of lading issued without having received the goods, under a statute providing that the carrier shall be liable to any person injured by issuing a bill of lading or receipt for things or property not re-

342, 560; *Chicago B. & N. R. Co. v. Sowle Elevator Co.*, 44 Minn. 224, s. c. 46 N. W. R. 342; *Friedlander v. Texas & P. R. Co.* 130 U. S. 416, s. c. 9 Sup. Ct. Rep. 570, 5 R. R. & Corp. L. J. 507, 28 Cent. L. J. 503, and note, 40 Am. & Eng. R. Cas. 70; *Schooner Freeman v. Buckingham*, 18 How. (U. S.) 182, 191; *The Lady Franklin*, 8 Wall. (U. S.) 325; *Pollard v. Vinton*, 105 U. S. 7; *Jessel v. Bath*, 2 Exchq. (L. R.) 267; *Bates v. Todd*, 1 Moo. & R. 106; *Lickbarrow v. Mason*, 2 T. R. 63; *Brown v. Powell D. S. C. Co.*, L. R., 10 C. P. 562; *Grant v. Norway*, 10 C. B. 665; *Hubbersty v. Ward*, 8 Exch. 330; *Cox v. Bruce*, 18 L. R. Q. B. D. 147; *Coleman v. Riches*, 16 Com. B. 104; *St. Louis, etc., R. Co. v. Knight*, 122 U. S. 79, 87; *Brown v. Powell, etc., Coal Co.*, L. R., 10 C. P. 562; *Williams v. Wilmington, etc., R. Co.*, 93 N. C. 42; *McLean v. Fleming*, L. R., 2 H. L. Sc. 128; *Baltimore, etc., R. Co. v. Wilkens*, 44 Md. 11; *Stone v. Wabash, etc., R. Co.*, 9 Brad. 48; *Meyer v. Dresser*, 16 Com. B. (N. S.) 646; *Sears v. Wingate*, 3 Allen (Mass.) 103; *Louisiana Bank v. Laveille*, 52 Mo. 380; *Hunt v. Mississippi Cent. R. Co.*, 29 La. Ann. 446. In some states statutes have been passed making the bills of lading in the hands of innocent purchasers conclusive evidence of the receipt of the goods mentioned. See *Hazard v. Ill. C. R. Co.*, 67 Miss. 32, 7 So. Rep. 280, 42 Am. & Eng. R. Cas. 455, where it is held that the Mississippi act of 1886

is not retroactive, as it is not a mere rule of evidence, but changes the character and legal effect of the contract evidenced by the bill of lading. See, also, *The Guiding Star*, 62 Fed. R. 407; *Jasper Trust Co. v. Kansas City, etc., R. Co.*, 99 Ala. 416, 14 So. R. 546, and statutes cited in 2 Am. & Eng. Encyc. of Law 241, 242.

<sup>1</sup> See an able opinion by Finch, J., in *Bank of Batavia v. New York, etc., R. Co.*, 106 N. Y. 195, 32 Am. & Eng. R. Cas. 497. See, also, *Brooke v. New York, etc., R. Co.*, 108 Pa. St. 529, 1 Am. Rep. 206, 21 Am. & Eng. R. Cas. 64; *Meyer v. Peck*, 28 N. Y. 590; *Sioux City & P. R. Co. v. First N. Bank*, 10 Neb. 556, 1 Am. & Eng. R. Cas. 278; *Armour v. Michigan Cent. R. Co.*, 65 N. Y. 111; *Wichita S. Bank v. Atchison, etc., R. Co.*, 20 Kan. 519, 20 Am. Ry. Rep. 299; *Miller v. Hannibal, etc., R. Co.*, 24 Hun (N. Y.) 607, reversed 90 N. Y. 430, 12 Am. & Eng. R. Cas. 30. It has been held that a railroad company having given a bill of lading reciting that the property is then lying in a depot at a certain place, and having agreed to forward it to the consignee, is estopped as against assignees of such bill who advance money on the faith thereof, from showing that at the time of giving such bill of lading the goods were in the adverse possession of another person. *St. Louis, etc., R. Co. v. Larned*, 103 Ill. 293, 6 Am. & Eng. R. Cas. 436.

ceived, but is not liable in such a case where the bill of lading is issued by the carrier's agent to a fictitious person and indorsed by such agent in the name of the fictitious person to one who is thus put upon inquiry.<sup>1</sup>

§ 1420. As evidence of condition, weight, or contents.—Bills of lading are only *prima facie* evidence between the original parties as to the condition of goods received for transportation, their statements that the goods are in "good order," or "apparent good order," being taken to refer only to the apparent external condition.<sup>2</sup> And similarly, a statement in a receipt for goods signed by the consignee that the goods were delivered to him by the carrier in good condition is a mere admis-

<sup>1</sup> Jasper Trust Co. v. Kansas City, etc., R. Co., 99 Ala. 416, 14 So. R. 546; Bank of Tupelo v. Kansas City, etc., R. Co., (Miss.) 16 So. R. 572.

<sup>2</sup> St. Louis, etc., R. Co. v. Neel, 56 Ark. 279, 19 S. W. R. 963; Nelson v. Woodruff, 1 Black 156; Clark v. Barnwell, 12 How. 272; Hastings v. Pepper, 11 Pick. 41; Bradstreet v. Heran, 2 Blatch. 116; Richards v. Doe, 100 Mass. 524; The Bark Olbers, 3 Ben. (U. S. C. C.) 148; The Oriflamme, 1 Sawyer 176; Arend v. Liverpool, etc., Co., 64 Barb. 118; Hazard v. Illinois Cen. R. Co., 67 Miss. 32, 7 So. R. 280; Missouri Pac. R. Co. v. Fennell, 79 Tex. 448, 15 S. W. R. 693; Missouri Pac. Ry. Co. v. Ioy, 79 Tex. 444, 15 S. W. R. 692; St. Louis, etc., R. Co. v. Knight, 122 U. S. 79, 30 Am. & Eng. R. Cas. 88; The Prosperino Palasso, 29 L. T. Rep. N. S. 622; Mitchell v. United States Ex. Co., 46 Iowa 214; Carson v. Harris, 4 Greene (Iowa) 516; Keith v. Amende, 1 Bush (Ky.) 455; Gowdy v. Lyon, 9 B. Mon. (Ky.) 112; Barrett v. Rogers, 7 Mass. 297; The Adriatic, 16 Blatch. (C. C.) 424; Chicago & A. R. Co. v. Benjamin, 63 Ill. 283; Illinois Cent. R. Co. v. Cowles, 32 Ill. 116; Bissel v. Price, 16 Ill. 408;

Choate v. Crowninshield, 3 Cliff. (C. C.) 184; Ellis v. Willard, 9 N. Y. 529; Meyer v. Peck, 28 N. Y. 590; Kimball v. Brander, 6 La. 711; Ship Howard v. Wissman, 18 How. (U. S.) 231; O'Brien v. Gilchrist, 34 Me. 554; Goodman v. Oregon, etc., Co., 22 Ore. 14, 28 Pac. R. 894; Seller v. Steamship Pacific, 1 Ore. 409. The legal effect of "apparent good order" and "good order" is the same. The Oriflamme, 1 Sawyer (C. C.) 176; Illinois Cent. R. Co. v. Cobb, 72 Ill. 148; Blade v. Chicago, St. P. & F. du L. R. Co., 10 Wis. 4. As to pencil interlineation as to bad order, see Goodman v. Oregon, R. & N. Co., 22 Ore. 14, 28 Pac. R. 894. It may be shown that the carrier wished to receipt for the goods as in poor condition but was not permitted to do so. Tierney v. New York, C. & H. R. Co., 67 Barb. (N. Y.) 538. The burden of rebutting the presumption that the goods were in the condition specified in the bill is on the carrier. Illinois Cent. R. Co. v. Cowles, 32 Ill. 116; Tarbox v. East S. B. Co., 50 Me. 339; Breed v. Mitchell, 48 Ga. 533; Whitney v. Gauche, 11 La. Ann. 432; Austin v. Talk, 20 Tex. 164; The Freedom, L. R. 3 P. C. 594.

sion, and is not conclusive.<sup>1</sup> Specifications as to weight or quality are *prima facie* evidence only,<sup>2</sup> being subject to contradiction by parol.<sup>3</sup> Particularly if the specifications are, in another part of the bill, qualified by the insertion of some such statement as "contents unknown," is the carrier not responsible for the discrepancy between the goods delivered and

<sup>1</sup> *Missouri Pac. R. Co. v. Fennell*, 79 Tex. 448, 15 S. W. R. 693.

<sup>2</sup> *McLean v. Fleming*, L. R. 2 H. L. (Sc.) 128, 25 L. T. Rep. N. S. 317; *Hall v. Grand T. R. Co.* 34 U. C. Q. B. 517; *Horseman v. Grand Trunk R. Co.*, 31 U. C. Q. B. 535; *Cox v. Bruce*, L. R. 18 Q. B. D. 147. A custom to treat statement of quantity as conclusive is unreasonable and void. *Strong v. Grand Trunk R. Co.*, 15 Mich. 206. But, see, *Rhodes v. Newhall*, 126 N. Y. 574, 27 N. E. R. 947, affirming 59 Hun 616, 12 N. Y. Supp. 669, and holding that where a carrier executes a bill of lading acknowledging the receipt of a certain quantity of wheat on board, which was weighed under the supervision of the carrier, and providing that "all the deficiency in the cargo shall be paid by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee," such carrier must pay for any deficiency in the quantity acknowledged by the bill of lading to have been received, and this may be deducted by the consignee from the gross amount of freight earned by the carrier, although it delivers all the wheat it actually did receive.

<sup>3</sup> *Abbe v. Eaton*, 51 N. Y. 410; *Meyer v. Peck*, 28 N. Y. 590, 33 Barb. 532; *Dean v. King*, 22 Ohio St. 118; *Strong v. Grand Trunk R. Co.*, 15 Mich. 206; *Steamboat Wisconsin v. Young*, 3 Greene (Ia.) 268; *Kirkman v. Bowen*, 8 Rob. (La.) 246; *The J.*

*W. Brown*, 1 Biss. 76; *Goodrich v. Norris*, Abbott Admr. 196; *Little Rock, etc., R. Co. v. Hall*, 32 Ark. 669; *Hall v. Mayor*, 7 Allen 454; *Manchester v. Milne*, 1 Abbott Admr. 115; *Blanchet v. Powell's Collieries Co.*, 9 L. R. Ex. 74; *Bates v. Todd*, 1 Moody & Rob. 106; *Glass v. Goldsmith*, 22 Wis. 488; *Erb v. Keokuk P. Co.*, 43 Mo. 53; *Lane v. Boston & A. R. Co.*, 112 Mass. 455; *Graves v. Harwood*, 9 Barb. (N. Y.) 477; *Naugatuck R. Co. v. Beardsley S. Co.*, 33 Conn. 218. The burden of the contradiction is usually on the carrier. *McLean v. Fleming*, L. R. 2 H. L. (Sc.) 128, 25 L. T. Rep. N. S. 317. But, see, *McCready v. Holmes*, 6 Am. L. Reg. 229. A fraudulent and mistaken statement in a bill of lading that the weight is less than it actually is will not prevent the carrier from recovering for the whole amount carried, according to the rate per hundred pounds stated in the bill. *Baird v. St. Louis, I. M. & S. R. Co.* (C. C. E. D. Ark.) 7 R. R. & Corp. L. J. 516, 42 Am. & Eng. R. Cas. 281, 41 Fed. R. 592. In this case it was held that the Arkansas statute providing that no carrier shall charge a greater sum for transporting freight than is specified in the bill of lading, was not intended to give validity to stipulations which were the result of mistake or fraud, and that the material part of the bill of lading was the part which fixed the rate per 100 pounds, and the weight stated did not control.

those described, having safely delivered the very goods it actually received.<sup>1</sup> And the use of the words "more or less" relieves the carrier from responsibility for the exact quantity mentioned if it fails to coincide with the quantity shipped.<sup>2</sup> The carrier may, however, by the insertion of such a phrase as "quantity guaranteed," bind itself conclusively.<sup>3</sup>

§ 1421. As evidence of value.—The shipper, when tendering goods for transportation, is not bound to disclose their value for insertion in the bill of lading, unless requested to do so.<sup>4</sup> If, however, he be requested to give the value he must

<sup>1</sup>St. Louis, etc., R. Co. v. Knight, 122 U. S. 79, 30 Am. & Eng. R. Cas. 88; Miller v. Hannibal, etc., R. Co., 90 N. Y. 430, reversing 24 Hun 607; Haddow v. Parry, 3 Taunt. 303; Jessel v. Bath, L. R. 2 Exch. 267; Vaughan v. Six, etc., Casks of Wine, 7 Ben. 506; Clark v. Barnwell, 12 How. 272; The Colombo, 3 Blatch. 521; Fasset v. Ruark, 3 La. Ann. 694; Levois v. Gale, 17 La. Ann. 302. A bill for a certain number of tons of scrap iron, "marked and numbered as per margin," and concluding, "weight unknown to" the master, binds the shipowner to deliver only so much as was actually shipped. Shepherd v. Naylor, 5 Gray 591. See, also, St. Louis, etc., Ry. Co. v. Knight, 122 U. S. 79, 30 Am. & Eng. R. Cas. 88. "Under the clause 'weight unknown,' the statement of 'three hundred tons' in the bill of lading was not even *prima facie* evidence as to the weight against the ship when it appeared that all that was received was delivered." Henderson v. Three, etc., Tons of Iron Ore, 38 Fed. R. 36. See, also, The Ismeale, 14 Fed. R. 491, 22 Fed. R. 559; Matthiessen v. Gusi, 29 Fed. R. 794; Lebeau v. General, etc., Navigation Co., L. R. 8 C. P. 88; The Peter der Grosse, L. R. 1 Prob. Div. 414; Clark v. Barnwell, 12 How. (U. S.)

272; Baxter v. Leland, Abb. Admr. Pr. 348; Vernard v. Hudson, 3 Sumn. (C. C.) 405. A weighmaster's certificate, not itself legal evidence, is insufficient to show a shortage in a cargo, where the master, before signing the bill of lading, wrote upon it, "I do not know the weight or quality." The Pietro G., 38 Fed. R. 148.

<sup>2</sup>O'Brien v. Gilchrist, 34 Me. 554; Shepherd v. Naylor, 5 Gray (Mass.) 591; Dean v. King, 22 Ohio St. 118; Winterport G. & B. Co. v. Schooner Jasper, 1 Holmes (C. C.) 99. A bill of lading, in which the carrier agrees to deliver "twenty-two hundred and eighty-two bushels of corn, more or less, all to be delivered," is complied with by the delivery of 2217 bushels, if no more was shipped. Kelley v. Bowker, 11 Gray 428. See, also, Peebles v. Boston & A. R. Co., 112 Mass. 498.

<sup>3</sup>Bissel v. Campbell, 54 N. Y. 353; Byrne v. Weeks, 7 Bosw. (N. Y.) 372.

<sup>4</sup>Levois v. Gale, 17 La. Ann. R. 302; Phillips v. Earle, 8 Pick. 182; Brooke v. Pickwick, 4 Bing. 218; Southern Ex. Co. v. Crook, 44 Ala. 468; Gorham Mfg. Co. v. Fargo, 45 How. (N. Y.) Pr. 90; Camden & A. R. Co. v. Baldauf, 16 Pa. St. 67; Relp v. Rapp, 3 W. & S. (Pa.) 21; Baldwin v. Liverpool & G. W. S. Co., 74 N. Y. 125;

do so truly,<sup>1</sup> else the carrier may be absolved from liability at least for any excess over the value given.<sup>2</sup> And he must not, by any subterfuge, deceive the carrier as to the value of the proffered goods.<sup>3</sup> So, of course, the valuation given by the shipper and stated in the bill of lading is not conclusive, as against the carrier and in favor of the shipper that the goods are worth that much. The construction of a written contract is usually for the court, but it has been held that where the bill of lading acknowledged the receipt for transportation of "one horse, value \$100; one colt," it was for the jury to determine whether the value given was intended to be that of the horse alone or both the horse and colt.<sup>4</sup>

§ 1422. **Misdescription in bill.**—Generally the damages resulting from a misdescription of goods in the bill of lading must be borne by the carrier or the shipper, according as the one or the other is responsible for it.<sup>5</sup> And a misdescription

*Parmelee v. Lowitz*, 74 Ill. 116; *Warner v. West T. Co.*, 5 Rob. (N.Y.) 490; *Merchants' D. T. Co. v. Bolles*, 80 Ill. 473. See, also, *Kember v. Southern Ex. Co.*, 22 La. Ann. R. 158; *Southern Ex. Co. v. Newby*, 36 Ga. 635; *Stoneman v. Erie R. Co.*, 52 N. Y. 429; *Tudor v. Macomber*, 14 Pick. (Mass.) 34. The failure of the shipper to disclose the value does not permit the carrier to rely upon a stipulation in the bill of lading limiting his liability to a stated amount, he having actually known, but failed to enter, the value. *Kember v. Southern Ex. Co.*, 22 La. Ann. R. 158; *Southern Ex. Co. v. Newby*, 36 Ga. 635; *Stoneman v. Erie R. Co.*, 52 N. Y. 429.

<sup>1</sup> *Boskowitz v. Adams Ex. Co.*, 5 Cent. L. Jour. 58; *Green v. Southern Ex. Co.*, 45 Ga. 305; *Little v. Boston, etc., R. Co.*, 66 Me. 239.

<sup>2</sup> *Muser v. American Ex. Co.*, 1 Fed. R. 382; *Hopkins v. Westcott*, 6 Blatch. (C. C.) 64; *Mather v. American Ex. Co.*, 2 Fed. R. 49; *Houston & T. C. R.*

*Co. v. Burke*, 55 Tex. 323; *Cole v. Goodwin*, 19 Wend. (N. Y.) 251; *Fish v. Chapman*, 2 Ga. 349; *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234, s. c. 32 Am. Dec. 455. The words "said to contain" so much money do not constitute even *prima facie* evidence against the carrier as to the amount actually received. *Fitzgerald v. Adams Ex. Co.*, 24 Ind. 447. See *Weil v. Express Co.*, 7 Phila. (Pa.) 88.

<sup>3</sup> *Chicago & A. R. Co. v. Thompson*, 19 Ill. 578; *Houston & T. C. R. Co. v. Burke*, 55 Tex. 323; *Cooper v. Berry*, 21 Ga. 526; *Great N. R. Co. v. Shepherd*, 14 Eng. L. & E. R. 367; *Lebeau v. General S. N. Co.*, 8 L. R. C. P. 88; *Cnicinnati, & C. R. Co. v. Marcus*, 38 Ill. 219; *Gibbon v. Paynton*, 4 Burr. 2298; *Magnin v. Dinsmore*, 62 N. Y. 35.

<sup>4</sup> *Coupland v. Housatonic R. Co.*, 61 Conn. 531, s. c. 23 Atl. R. 870.

<sup>5</sup> *Hyde v. N. Y., etc., S. S. Co.*, 17 La. Ann. 29; *Fassett v. Ruark*, 3 La. Ann. 694; *Chicago & A. R. Co. v.*

of goods by the carrier, with knowledge of what they are, is usually not binding upon the shipper so as to release the carrier from responsibility for the goods actually received.<sup>1</sup> The statement of the route and place of delivery in the bill of lading will control the marks on the goods and be generally accepted as evidence, showing the contract of the parties.<sup>2</sup> So, where the goods are misdirected by the shipper, and are lost by reason thereof, without the fault of the carrier, the latter is not liable therefor.<sup>3</sup>

**§ 1423. As evidence of contract—Not variable by parol.**—In the absence of fraud or mistake, it must be conclusively presumed that the oral negotiations respecting the terms and conditions upon which the goods were received, the route, and the rate at which they were forwarded, are merged in the bill of lading. This must be taken as the final repository and the sole evidence of the agreement between the parties.<sup>4</sup> The bill

Thompson, 19 Ill. 578; Chicago & A. 281; Guillaume v. General T. Co., 100 R. Co. v. Shea, 66 Ill. 471; American N. Y. 491; Germania F. I. Co. v. Ex. Co. v. Perkins, 42 Ill. 458; McClune v. Burlington, C. R. & N. R. Co., 28 Am. R. 113; Bedell v. Richmond, etc., R. Co., 94 Ga. 22, s. c. 20 S. E. R. 52 Iowa 600; New Jersey R. & T. Co. v. Pennsylvania R. Co., 3 Dutch. (N. J.) 100; Southern Ex. Co. v. Womack, 262; Davis v. Central Vt. R. Co., 66 1 Heisk. (Tenn.) 256; Southern Ex. Vt. 290, s. c. 61 Am. & Eng. R. Cas. Co. v. Crook, 44 Ala. 468; McCoy v. 197; Clark v. Barnwell, 12 How. 272; The Delaware, 14 Wall. 579; The Caledonia, 43 Fed. R. 681; Center v. E. & W. T. Co., 42 Md. 498. Torrey, 8 Mart. La. R. 206; Hewett

<sup>1</sup> Harmon v. N. Y., etc., R. Co., 28 Barb. 323; Bancroft v. Peters, 4 Mich. 619.

<sup>2</sup> Moore v. Henry, 18 Mo. App. 35.

<sup>3</sup> Lake Shore, etc, R. Co. v. Hodapp, 83 Pa. St. 22; Congar v. Chicago, etc., R. Co., 24 Wis. 157; Southern Exp. Co. v. Kaufman, 12 Heisk. (Tenn.) 161; Erie R. Co. v. Wilcox, 84 Ill. 239; Stimson v. Jackson, 58 N. H. 138.

<sup>4</sup> Snow v. Indiana, etc., R. Co., 109 Ind. 422; Louisville, etc., R. Co. v. Wilson, 119 Ind. 352; Indianapolis, etc., R. Co. v. Remmy, 13 Ind. 518; Hall v. Penn. Co., 90 Ind. 459; Bartlett v. Pittsburgh, etc., R. Co., 94 Ind.

281; Guillaume v. General T. Co., 100 N. Y. 491; Germania F. I. Co. v. Memphis, etc., R. Co., 72 N. Y. 90, s. c. 28 Am. R. 113; Bedell v. Richmond, etc., R. Co., 94 Ga. 22, s. c. 20 S. E. R. 262; Davis v. Central Vt. R. Co., 66 Vt. 290, s. c. 61 Am. & Eng. R. Cas. 197; Clark v. Barnwell, 12 How. 272; The Delaware, 14 Wall. 579; The Caledonia, 43 Fed. R. 681; Center v. Torrey, 8 Mart. La. R. 206; Hewett v. Chicago, etc., R. Co., 63 Iowa 611; Louisville, etc., Co. v. Fulgham, 91 Ala. 555, 8 So. R. 803; Wayland v. Mosely, 5 Ala. 430; O'Bryan v. Kinney, 74 Mo. 125; St. Louis, etc., R. Co. v. Cleary, 77 Mo. 634; Arnold v. Jones, 26 Tex. 335; White v. Van Kirk, 25 Barb. (N. Y.) 16; Hinckley v. New York, etc., R. Co., 56 N. Y. 429; Turner v. St. Louis, etc., R. Co. 20 Mo. App. 632; Shaw v. Merchants' Nat. Bank, 8 W. N. C. (Pa.) 221; Peck v. Dinsmore, 4 Por. (Ala.) 212; Chicago, etc., R. Co. v. Northern, etc., Co., 70 Ill. 217; May v. Babcock, 4 Ohio 334;

of lading being silent in respect to the line by which the goods are to be forwarded, its effect is the same as if a provision were therein inserted that the carrier should have the right to select at his discretion any customary or usual route which was regarded as safe and responsible. This provision, being thus imported into the contract by law, is as unassailable by parol as any of the other express terms of the contract.<sup>1</sup> Where goods are received and actually shipped under a parol contract, the subsequent receipt of a bill of lading does not preclude the shipper from showing the terms of the parol contract,<sup>2</sup> unless

Lawrence v. McGregor, Wright (Ohio) 193; Cincinnati, etc., R. Co. v. Pontius, 19 Ohio St. 221; Knowles v. Dabney, 105 Mass. 437; Shaw v. Gardner, 12 Gray (Mass.) 488; Wallace v. Matthews, 39 Ga. 617; Wilde v. Merchants' Dispatch, etc., Co., 47 Iowa 272; Sproat v. Donnell, 26 Me. 185; Merchants' D. T. Co. v. Leysor, 89 Ill. 43; United States Ex. Co. v. Haines, 67 Ill. 137. In the case of Union etc., Co. v. Riegel, 73 Pa. St. 72, it was held that where certain parol arrangements were made at the time the bill was signed, both should be submitted to the jury to enable it to determine which was the contract. See, also, Atwell v. Miller, 11 Md. 348. But in Hostetter v. Baltimore, etc., R. Co., (Pa.) 11 Atl. Rep. 609, the court upheld the refusal of an instruction that a bill of lading on its face was but a memorandum, and not in form a contract *inter partes*, and oral testimony might be received to show the real contract.

<sup>1</sup>White v. Ashton, 51 N. Y. 280; Hinkley v. New York, etc., R. Co., 56 N. Y. 429; Simkins v. Norwich, etc., S. Co., 11 Cush. 102; Hudson C. Co. v. Penn. C. Co., 8 Wall. 276; Snow v. Indiana, etc., R. Co., 109 Ind. 422. Where the bill is silent as to the time of shipment, the implied obligation to ship within a reasonable time after the goods are delivered is a part of the

contract, and can not be modified by parol evidence of an undertaking to ship on a certain train. Pennsylvania Co. v. Clark, 2 Ind. App. 146, 27 N. E. R. 586, distinguishing Cincinnati, etc., R. Co. v. Case, 122 Ind. 310.

<sup>2</sup>Guillaume v. General T. Co., 100 N. Y. 491; Snow v. Indiana, etc., R. Co., 109 Ind. 422; Bostwick v. Baltimore, etc., R. Co., 45 N. Y. 712; Swift v. Pacific, etc., Steamship Co., 106 N. Y. 206; Wheeler v. New Brunswick, etc., R. Co., 115 U. S. 29; Wilde v. Merchants', etc., Co., 47 Iowa 247; McCullough v. Wabash, etc., R. Co., 34 Mo. App. 23. A bill of lading, modifying a previous parol contract, accepted by the shipper without noticing the charges does not supersede the latter which may be proved by the shipper. Missouri, etc., R. Co. v. Beeson, 30 Kan. 298. A shipper alleged and testified that the shipment was made under a parol agreement, without limitation of liability, for carriage to a point beyond the defendant's line, and that, after the stock was loaded and had left the station, he signed a paper which he could not well read, and did not read, but which he supposed to be a receipt. The company contended, and offered testimony to show, that the only contract made with the shipper was the written one embodied in the bill of lading signed by the shipper, and



it appears that between the shipper and the carrier the established custom has been for the former to receive bills of lading constituting the contract after the shipment.<sup>1</sup> Neither does the acceptance of a bill of lading on a subsequent shipment of goods waive the right to damages for the violation of a contract for an earlier supply of the necessary cars for the shipment of the same goods.<sup>2</sup> A bill of lading, under the rules applicable to other written contracts, may be explained by parol if ambiguous,<sup>3</sup> or, sometimes, if subject to a usage which is annexable to the contract as an incident, may be explained by usage.<sup>4</sup> And, in accordance with the rule that written contracts may be modified, changed or rescinded by a new and valid parol contract at any time after their execution, it is competent to prove that the contract embodied in a bill of lading was abandoned and the goods shipped under a parol contract subsequently made.<sup>5</sup> So fraud or mistake may be shown by parol evidence in a proper case.<sup>6</sup>

which, to a great extent, limited the liability of the company. It was held that the court was warranted in submitting to the jury the question of what constituted the contract of the parties, and in defining what the common law liability of the company was, in case they should find in favor of the theory of the shipper. *St. Louis, etc., R. Co. v. Clark*, 48 Kan. 321, 329, 29 P. Rep. 312.

<sup>1</sup> *Shelton v. Merchants' D. T. Co.*, 59 N. Y. 258.

<sup>2</sup> *McAbsher v. Richmond, etc., R. Co.*, 108 N. C. 344, 12 S. E. R. 892; *Hamilton v. Western, etc., R. Co.*, 96 N. C. 398, 3 S. E. Rep. 164.

<sup>3</sup> *The Wanderer*, 29 Fed. R. 260; *The Delaware*, 14 Wall. (U. S.) 579. The meaning of C. O. D. may be shown by parol. *Am. Ex. Co. v. Lesem*, 39 Ill. 312. In *Savannah, etc., R. Co. v. Collins*, 77 Ga. 376, 3 S. E. R. 416, goods were received for transportation to a point beyond the

company's line, and the following receipt issued: " \* \* \* Received from J. \* \* \* the following articles for shipment to W., Cedar Keys, Fla.: 1 bdl. bedding. [Name,] Care R. R. Agt., Callahan. [Signed] D., Agt." In an action to recover for the loss of the goods, it was held that the words, "Care R. R. Agt., Callahan," are ambiguous, and that they may be explained by parol evidence.

<sup>4</sup> *Hutchinson on Carriers*, (2d ed.) § 126 b, citing *The Delaware*, 14 Wall. 579; *Creery v. Holly*, 14 Wend. 26; *The Waldo, Davies* 161; *Blackett v. Royal Exchange Co.*, 2 Crompt. & J. 244; *Arnold on In.*, 776; *Lenox v. United Ins. Co.*, 3 Johns. Cas. 178; *Shackleford v. Wilcox*, 9 La. 33; *Barber v. Brace*, 3 Conn. 9; *Sproat v. Donnell*, 26 Me. 185.

<sup>5</sup> *Toledo, etc., R. Co. v. Levy*, 127 Ind. 168, 26 N. E. R. 773.

<sup>6</sup> *Long v. New York, etc., R. Co.*, 50 N. Y. 76; *Louisville, etc., R. Co. v.*

§ 1424. **Construction of bills of lading.**—As with other contracts, the meaning of the parties is to be gathered from the bill as a whole;<sup>1</sup> and, there being both a bill of lading and a shipping note, executed and delivered simultaneously and relating to the same matter, they constitute one agreement.<sup>2</sup> In case of doubt a bill of lading should generally be construed strictly, but reasonably, against the carrier.<sup>3</sup> Written portions prevail over contradictory printed portions.<sup>4</sup> And a memorandum written on the margin of the bill of lading may be as valid as if written in the body of the bill.<sup>5</sup> Other general rules governing the interpretation or construction of bills of lading will be found in another section.<sup>6</sup>

§ 1425. **Construction of particular words and phrases.**—It is held that such abbreviations as “C. O. D.” and “F. O. B.” have by long usage acquired a fixed and well known meaning, and that courts and juries understand without further explanation the meaning of such terms,<sup>7</sup> but it is said by other courts that their meaning can not be considered as judicially settled so that judicial notice can be taken of the purpose for which

Wilson, 119 Ind. 352, s. c. 21 N. E. R. 341; Baltimore, etc., Steamboat Co. v. Brown, 54 Pa. St. 77; Chouteaux v. Leech, 18 Pa. St. 224; Richmond, etc., R. Co. v. Shomo, 90 Ga. 496.

<sup>1</sup> Ashmore v. Pa. S. T. Co., 28 N. J. L. 180; Lawrence v. McGregor, Wright (Ohio) 193; Heineman v. Grand T. R. Co., 31 How. Pr. (N. Y.) 430. The shipper is not bound by a clause on the back of the shipping bill, which, apparently by inadvertence, was not struck out, or adapted to the terms of the special contract. Jennings v. Grand Trunk R. Co., 52 Hun 227, 23 N. Y. S. R. 15, 5 N. Y. Supp. 140. The caption is part of the bill. Robinson v. Merchants' D. T. Co., 45 Iowa 470; Stewart v. Merchants' D. T. Co., 47 Iowa 229; United States v. Kimbal, 13 Wall. 636.

<sup>2</sup> Jennings v. Grand Trunk R. Co.,

52 Hun 227, 23 N. Y. S. R. 15, 5 N. Y. Supp. 140. See, also, Richmond, etc., R. Co. v. Shomo, 90 Ga. 496.

<sup>3</sup> Babcock v. Lake, etc., R. Co., 49 N. Y. 491; Miller v. Hannibal, etc., R. Co., 24 Hun (N. Y.) 607; Elkins v. Empire T. Co., 2 Weekly Notes Cas. (Pa.) 403; Lebeau v. Gen. S. N. Co., 42 L. J. C. P. 1, 8 L. R. C. P. 88.

<sup>4</sup> Alabama, etc., R. Co. v. Thomas, 89 Ala. 294, s. c. 18 Am. St. R. 119; Stanard Milling Co. v. White Line, etc., Co., 122 Mo. 258, s. c. 61 Am. & Eng. R. Cas. 185.

<sup>5</sup> Brown v. Adams, 3 Tex. App. (Civil Cases) 462.

<sup>6</sup> Post, § 1425. As to the conflict of laws, see, post, §§ 1494, 1506.

<sup>7</sup> United States Express Co. v. Keefer, 59 Ind. 263; American, etc., Express Co. v. Schier, 55 Ill. 140; State v. Intoxicating Liquors, 73 Me. 278.

they are used, and that parol evidence may be used to explain them and thus to remove all ambiguity by showing their meaning in the contract in which they are employed.<sup>1</sup> Their technical or customary meaning being thus established, and all ambiguity being removed, it has been held that parol evidence is no further admissible to vary or explain them, and, of course, if the words or terms are used in the ordinary and usual sense as commonly used by everybody, no parol evidence is necessary. Where "C. O. D." is used it is held that the contract of the carrier, in connection therewith, is not only for the safe carriage and delivery of the goods to the consignee but it further contracts with the consignor that it will "collect on delivery" and return to him the charges on such goods.<sup>2</sup> The phrase "at owner's risk," as used in bills of lading, is construed to only exempt the carrier from liability as insurer, and not to exempt him from liability for negligence,<sup>3</sup> and the insertion of the words "at the convenience of the company" will not protect the company in case of unreasonable delay.<sup>4</sup> It is held that the words "privilege of reshipping" in a bill of lading are intended for the benefit of the carrier, but it is bound for safe delivery to the same extent as if such words did not appear,<sup>5</sup> and it has also been held that the general liability of

<sup>1</sup> *Collender v. Dinsmore*, 55 N. Y. 200, 14 Am. R. 224; *Silberman v. Clark*, 96 N. Y. 522.

<sup>2</sup> *United States Express Co. v. Keefer*, 59 Ind. 263; *American, etc., Express Co. v. Schier*, 55 Ill. 140. It has been held that if the consignee neglects or refuses to take and pay for the goods they remain in the carrier's hands subject only to his liability as a warehouseman. *Gibson v. American, etc., Express Co.*, 1 Hun 387. See, also, *Pacific Express Co. v. Wallace*, 60 Ark. 100, 61 Am. & Eng. R. Cas. 170; *Railway Co. v. Cravens*, 57 Ark. 112; *Weed v. Barney*, 45 N. Y. 344.

<sup>3</sup> *Mobile, etc., R. Co. v. Jarboe*, 41 Ala. 644; *Fitzgerald v. Grand Trunk R. Co.*, 4

Ont. App. 601; *Baltimore, etc., R. Co. v. Rartbone*, 1 W. Va. 87; *Nashville, etc., R. Co. v. Jackson*, 6 Heisk. (Tenn.) 271. See *post*. § 1505.

<sup>4</sup> *Branch v. Wilmington, etc., R. Co.*, 88 N. Car. 573, s. c. 18 Am. & Eng. R. Cas. 621; *Whitehead v. Wilmington, etc., R. Co.*, 87 N. Car. 255, 9 Am. & Eng. R. Cas. 168.

<sup>5</sup> *Broadwell v. Butler*, 6 McLean (U. S.) 296. And evidence of usage was held admissible. See, also, *Little v. Semple*, 8 Mo. 99, s. c. 40 Am. Dec. 123; *Carr v. Steamboat Michigan*, 27 Mo. 196, s. c. 72 Am. Dec. 257; *McGregor v. Kilgore*, 6 Ohio 358, s. c. 27 Am. Dec. 260.

the carrier is not restricted by an exception on account of "unavoidable dangers and accidents of the road."<sup>1</sup>

§ 1426. As muniments of title—Delivery by carrier.—A bill of lading is regarded as a symbol of the property therein described, and stands in the place of the goods it represents.<sup>2</sup> If it is issued to the true owner<sup>3</sup> of goods, it secures his title thereto during the period of transportation while the ownership and possession are severed. The carrier must bear the risk of delivering the goods to the person entitled to them under the bill and its indorsements.<sup>4</sup> If there be no reservation by the shipper, the title presumptively rests in the consignee,<sup>5</sup>

<sup>1</sup> *Walpole v. Bridges*, 5 Blackf. (Ind.) 222. See, also, *Fowler v. Davenport*, 21 Tex. 626, and *Harmony v. Bingham*, 1 Duer (N. Y.) 209. But it seems to us that this decision is erroneous.

<sup>2</sup> *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, s. c. 17 S. W. R. 608; *Dodge v. Meyer*, 61 Cal. 405; *Evansville, etc., R. Co. v. Erwin*, 84 Ind. 457, s. c. 9 Am. & Eng. R. Cas. 252; *Baltimore, etc., R. Co. v. Wilkens*, 44 Md. 11.

<sup>3</sup> *The Idaho*, 93 U. S. 575; *Blossom v. Champion*, 37 Barb. (N. Y.) 554; *Dows v. Perrin*, 16 N. Y. 325; *Moore v. Robinson*, 62 Ala. 537; *Saltus v. Everett*, 20 Wend. (N. Y.) 267; *Mechanics, etc., Bank v. Farmers' & M. Bank*, 60 N. Y. 40; *Richardson v. Smith*, 33 Ga. (Lester's Sup.) 95; *Union, etc., T. Co. v. Yeager*, 34 Ind. 1; *Craven v. Ryder*, 6 Taunt. 433. If the carrier is compelled by legal action to deliver the goods to the true owner, he can not be held for failing to deliver in accordance with the bill. *Bliven v. Hudson R. R. Co.*, 36 N. Y. 403; *King v. Richards*, 6 Whart. (Pa.) 418; *Bates v. Stanton*, 1 Duer (N. Y.) 79; *Hardman v. Wilcock*, 9 Bing. 382; *Biddle v. Bond*, 6 Best & S. 225; *Cheesman v. Exall*, 6 Exch. 341; *Stol-*

*lenwerck v. Thacher*, 115 Mass. 224. But see *Saltus v. Everett*, 20 Wend. 267; *Pickering v. Busk*, 15 East 38.

<sup>4</sup> *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 34; *Bailey v. Hudson River Railroad*, 49 N. Y. 70; *Hawkins v. Hoffman*, 6 Hill 586; *Devereux v. Barclay*, 2 B. & Ald. 702; *Guillaume v. Hamburg, etc., Packet Co.*, 42 N. Y. 212; *Duff v. Budd*, 3 B. & Bing. 177; *Merchants' D., etc., Co. v. Merriam*, 111 Ind. 5. The carrier must recognize all transfers of the bill by indorsement. *Walker v. Detroit, etc., R. Co.*, 49 Mich. 446, 9 Am. & Eng. R. Cas. 251; *Colgate v. Pennsylvania Co.*, 102 N. Y. 120. Evidence, however, of previous deliveries to one who was neither the consignee nor entitled to the delivery by the terms of the bill of lading, or by its assignment, with the knowledge of the owner of the goods and without any objection having been made by him, has been held to justify such a delivery. *Hutchinson on Carriers*, (2d ed.) § 1373, citing *Ontario Bank v. New Jersey Steamboat Co.*, 59 N. Y. 510.

<sup>5</sup> *Congar v. Galena R. Co.*, 17 Wis. 477; *Griffith v. Ingledew*, 6 S. & R. (Pa.) 429; *McCauley v. Davidson*, 13 Minn. 162; *Lawrence v. Minturn*,

but, under some circumstances, only after his receipt of the bill of lading.<sup>1</sup> A delivery to him, upon presentation of the bill,<sup>2</sup> will discharge the carrier, he having had no notice of the failure of the presumption.<sup>3</sup> A bill directing delivery to the vendor's order is *prima facie* evidence that he does not intend that the title shall pass to the vendee, and notice to the carrier that he must not deliver to the consignee without the bill properly indorsed by the consignor.<sup>4</sup> A pledgee to whom a

17 How. (U. S.) 100; *Krulder v. Elison*, 47 N. Y. 36; *Watkins v. Paine*, 57 Ga. 50; *Merchants', etc., Co. v. Smith*, 76 Ill. 542; *Sedgwick v. Cottingham*, 54 Iowa 512; *Toney v. Corliss*, 33 Me. 333; *Arnold v. Prout*, 51 N. H. 587; *Schlesinger v. Stratton*, 9 R. I. 578. The presumption may be rebutted. *Dawes v. Peck*, 8 T. R. 330; *Dutton v. Solomonson*, 3 B. & P. 582; *Holbrook v. Wight*, 24 Wend. 169; *Covell v. Hitchcock*, 23 Wend. 611; *Waldron v. Romaine*, 22 N. Y. 368; *Stanton v. Eager*, 16 Pick. 467; *Cross v. O'Donnell*, 44 N. Y. 661; *Anderson v. Clark*, 2 Bing. 20; *Walley v. Montgomery*, 3 East 585; *Haille v. Smith*, 1 B. & P. 563.

<sup>1</sup> *Bruce v. Andrews*, 36 Mo. 593; *Hausman v. Nye*, 62 Ind. 485; *Mitchell v. Ede*, 11 Ad. & Ellis 888; *Conard v. Atlantic I. Co.*, 1 Peters (U. S.) 386; *Pratt v. Parkman*, 24 Pick. (Mass.) 42; *Bank of Rochester v. Jones*, 4 N. Y. 497; *First Nat. Bank v. Crocker*, 111 Mass. 163; *Taylor v. Turner*, 87 Ill. 296.

<sup>2</sup> The carrier must ascertain, it has been held, whether a bill was issued, and, if so, deliver only in accordance therewith. *City Bank v. Rome, etc., R. Co.*, 44 N. Y. 136; *Furman v. Union Pacific, etc., R. Co.*, 106 N. Y. 579. A custom at the residence of both the consignee and the holder of a draft with bill attached, of delivery without the bill, will justify the carrier in so delivering. *Forbes v. Boston, etc.,*

*Railroad*, 133 Mass. 154. But such local custom will not prevail against a consignor without knowledge of it. *Weyand v. Atchison, etc., Railroad*, 75 Iowa 573, nor against a statute requiring delivery only on presentation of bill. *Colgate v. Pennsylvania Co.*, 102 N. Y. 120.

<sup>3</sup> *O'Dougherty v. Boston, etc., Railroad*, 1 Thomp. & C. 477; *Sweet v. Barney*, 23 N. Y. 335; *Lawrence v. Minturn*, 17 How. 100. The carrier has the right, under such circumstances, to settle with the consignee a claim for damages for non-delivery. *Scammon v. Wells, Fargo & Co.*, 84 Cal. 311, 24 P. R. 284.

<sup>4</sup> *Benjamin on Sales*, ch. 6, bk. 2, and cases there cited. *Pennsylvania R. Co. v. Stern*, 119 Pa. St. 24; *North Penn. R. Co. v. Commercial Bank*, 123 U. S. 727; *Watson v. Hoosac Tunnel Line*, 13 Mo. App. 263; *Libby v. Ingalls*, 124 Mass. 503; *Furman v. Union Pac., etc., R. Co.*, 106 N. Y. 579; *Joslyn v. Grand T. R. Co.*, 51 Vt. 92; *First Nat. Bank v. Northern Railroad Co.*, 58 N. H. 203; *Boatmen's, etc., Bank v. Western, etc., Railroad*, 81 Ga. 221; *Bass v. Glover*, 63 Ga. 745; *Holmes v. Bailey*, 92 Pa. St. 57; *Mason v. Great W. R. Co.*, 31 U. C. Q. B. 73; *Halsey v. Warden*, 25 Kan. 128; *Alderman v. Eastern R. Co.*, 115 Mass. 233; *Commercial Bank v. Pfeiffer*, 22 Hun 327; *Security Bank v. Luttgen*, 29 Minn. 363; *Jenkyns v. Brown*, 14

bill has been delivered has, in general, the same rights as a purchaser for value, and may maintain an action of replevin for the possession.<sup>1</sup>

§ 1427. **Effect of direction in bill of lading to "notify" some designated person.**—A direction in a bill of lading to consignor's order to "notify" some one else, does not warrant the carrier in delivering the property to the person so to be notified without the production of the bill of lading.<sup>2</sup> The use of the term "notify" shows that the party to be notified was not intended as the consignee, but was simply to be advised of the arrival of the goods.<sup>3</sup> The fact that a bill of lading is

Q. B. 496; *Ellershaw v. Magniac*, 6 Ex. 569; *Ogg v. Shuter*, L. R. 1 C. P. Div. 47. So with a bill directing delivery to the order of the vendor's agent. *The St. Joze Indiano*, 1 Wheat. 208; *Dows v. Nat. Ex. Bank*, 91 U. S. 618. There is the same presumption where the vendor assigns the bill to one who discounts a draft. The title only passes with the acceptance or payment of the draft. *Dows v. Nat. Ex. Bank*, 91 U. S. 618; *Alderman v. Eastern R. Co.*, 115 Mass. 233; *Stollenwerck v. Thacher*, 115 Mass. 224; *Jenkyns v. Brown*, 14 Q. B. 496; *People's, etc., Bank v. Stewart*, 3 P. & B. (19 New Bruns.) 268. "It is no excuse," says the court in *The Thames*, 14 Wall. (U. S.) 98, "for a delivery to the wrong person that the indorsee of the bills of lading was unknown, if indeed he was, and that notice of the arrival of the cotton could not be given. Diligent inquiry for the consignee at least was a duty, and no inquiry was made. Want of notice is excused when a consignee is unknown or is absent or can not be found after diligent search. And if, after inquiry, the consignee or indorsees of a bill of lading for delivery to order can not be found, the duty of the carrier is to retain the goods until they are claimed, or store them prudently for and on account of

the owner. He may thus relieve himself from a carrier's responsibility. He has no right, under any circumstances, to deliver to a stranger." An invoice furnishes no proof of title, and the carrier is not justified in relying on it in making delivery. *Pennsylvania Co. v. Stern*, 119 Pa. St. 24. As to factors receiving bills, see *Rice v. Austin*, 17 Mass. 197; *Vallé v. Carré*, 36 Mo. 575; *Davis v. Bradley*, 24 Vt. 55; *Wade v. Hamilton*, 30 Ga. 450.

<sup>1</sup> *Fifth Nat. Bank v. Bayley*, 115 Mass. 228; *First National Bank v. Dearborn*, 115 Mass. 219; *Dows v. Nat. Ex. Bank*, 91 U. S. 618; *Tilden v. Minor*, 45 Vt. 196; *Farmers', etc., & M. Bank v. Logan*, 74 N. Y. 568; *Marine Bank v. Wright*, 48 N. Y. 1.

<sup>2</sup> *National Bank v. Atlanta, etc., Co.*, 25 S. Car. 216; *Libby v. Ingalls*, 124 Mass. 503; *North v. Merchants', etc., Co.*, 146 Mass. 315, s. c. 15 N. E. R. 779; *Joslyn v. Grand T. R. Co.*, 51 Vt. 92; *North Pennsylvania R. Co. v. Commercial Bank*, 123 U. S. 727, s. c. 8 Sup. Ct. R. 266; *Furman v. Union Pac., etc., R. Co.*, 106 N. Y. 579. And the bill must usually be indorsed, in such a case, by the consignor.

<sup>3</sup> *Union Stock Yards Co. v. Westcott, (Neb.)* 66 N. W. R. 419, 422; *Furman v. Union Pac. R. Co.*, 106

made out to the consignor's order makes this still plainer. Indeed, it has been held that such a contract is so plain and unambiguous that a custom in a certain city to deliver property under similar bills of lading to the person to be notified can not be shown.<sup>1</sup>

§ 1428. **Bills of lading assignable, but not negotiable.**—As already stated, bills of lading are not negotiable as commercial paper,<sup>2</sup> and any defense available against an action by the shipper is generally available against one by an innocent holder for value.<sup>3</sup> They are, however, assignable, and in a

N. Y. 579. It has been said that if he were the consignee such direction would be unnecessary, for it is the duty of a carrier to notify the consignee upon the arrival of the goods anyway. *North Pennsylvania R. Co. v. Commercial Bank*, 123 U. S. 727, s. c. 8 Sup. Ct. R. 266.

<sup>1</sup>*Bank of Commerce v. Bissell*, 72 N. Y. 615. It is common practice to forward such bills of lading with a draft on the purchaser which he is to pay before obtaining the goods. As to the effect of this, see *Hieskell v. Farmer's, etc., Bank*, 89 Pa. St. 155; *National Bank v. Merchants' Bank*, 91 U. S. 92; *Dows v. National, etc., Bank*, 91 U. S. 618; *Marine Bank v. Wright*, 48 N. Y. 1; *Commercial Nat. Bank v. Chicago, etc., R. Co.*, (Ill.) 43 N. E. R. 756; *Tiedeman Commercial Paper*, § 494, and authorities cited in preceding notes to this section.

<sup>2</sup>*Friedlander v. Texas & P. R. Co.*, 130 U. S. 416, 40 Am. & Eng. R. Cas. 70; *Stollenwerck v. Thacher*, 115 Mass. 224; Am. notes to *Lickbarrow v. Mason*, 2 T. R. 63, 1 Smith's Leading Cas. 8th ed. 1159; *Douglas v. People's Bank*, 86 Ky. 176, s. c. 5 S. W. R. 420. Many statutes have been enacted for the purpose of making bills of lading negotiable, but they are generally held not to

make them negotiable in the fullest sense, as commercial paper. For the construction of respectively the Pennsylvania and the Maryland statutes, see *Shaw v. Railroad Co.*, 101 U. S. 557; *Tiedeman v. Knox*, 53 Md. 612. For construction of Minnesota statute, see *National Bank v. Chicago, etc., R. Co.*, 44 Minn. 224, s. c. 46 N. W. R. 342. In *Knight v. St. Louis, etc., R. Co.*, 141 Ill. 110, s. c. 30 N. E. R. 543, it was held that an assignee of a bill of lading can not sue the carrier in his own name for failure to transport and deliver the goods according to the contract, since bills of lading are non-negotiable.

<sup>3</sup>*Hazard v. Illinois, etc., R. Co.*, 67 Miss. 32, 7 So. R. 280, 42 Am. & Eng. R. Cas. 455. In *Boatman's Savings Bank v. Western, etc., R. Co.*, 81 Ga. 221, 7 S. E. R. 125, the plaintiff, to whom a bill of lading and draft had been indorsed for value, presented the draft for acceptance. The acceptance was refused on the ground that the goods had been sold on sixty days' time, the drawees promising to accept such draft. The bank having possession of the bill, the railroad company delivered the goods to the purchasers, who were drawees of the draft, after which such purchasers executed their note for the price of

larger than usual sense inasmuch as their assignment constitutes a complete legal delivery of the goods.<sup>1</sup> But, as a rule at least, a fraudulent assignment is no excuse for the delivery of the goods to any one, even a *bona fide* purchaser for a valuable consideration, other than the true owner.<sup>2</sup> The consignor's rights under the bill may be transferred by its delivery and indorsement,<sup>3</sup> and a delivery without indorsement will convey the title if the intention is clear.<sup>4</sup> It has also been held that the indorsement may be made conditional or restrictive,

the goods, as of the date of the bill and draft, payable in sixty days. The note was discounted by the bank for value, without notice that it was for the goods described in the bill of lading, or that the goods had been delivered to the makers. It was held that the bank could recover on the bill of lading, although the makers paid the note, the latter not being for the exact amount of the draft.

<sup>1</sup> Benjamin on Sales, § 813; Meyerstein v. Barber, L. R. 2 C. P. 38; Michigan C. R. Co. v. Phillips, 60 Ill. 190; Stone v. Wabash, etc., R. Co., 9 Ill. App. 48; Burton v. Curyea, 40 Ill. 320; McKee v. Garcelon, 60 Me. 165; Robinson v. Stuart, 68 Me. 61; Stone v. Swift, 4 Pick. 389; Forbes v. Boston, etc., R. Co., 133 Mass. 154; Davis v. Bradley, 28 Vt. 118; Tilden v. Minor, 45 Vt. 196; Joslyn v. Grand T. R. Co., 51 Vt. 92; Hazard v. Fiske, 83 N. Y. 287; Dodge v. Meyer, 61 Cal. 405; Campbell v. Alford, 57 Tex. 159. See, also, Blackburn on Sales, 297; Hatfield v. Phillips, 9 M. & W. 647; Sewell v. Burdick, 52 L. T. R. 445, and cases therein reviewed. The rights of an assignee for value are equal to, but not greater than, those of the assignor. Haas v. Kansas City, etc., R., 81 Ga. 792; Tison v. Howard, 57 Ga. 410; Shaw v. Railroad Co., 101 U. S. 557. And

the assignee's title is superior to the lien claim of a person to whom the carrier delivered the property, for charges against the transferrer on prior consignments. Dickson v. Merchants' Elevator Co., 44 Mo. App. 498.

<sup>2</sup> Gurney v. Behrend, 3 El. & Bl. 622; Shaw v. Railroad Co., 101 U. S. 557; Brower v. Peabody, 13 N. Y. 121; Decan v. Shipper, 35 Pa. St. 239; Dows v. Perrin, 16 N. Y. 325; Compare Dows v. Greene, 24 N. Y. 638.

<sup>3</sup> The Thames, 14 Wall. (U. S.) 98.

<sup>4</sup> Jeffersonville, etc., R. Co. v. Irvin, 46 Ind. 180; Gibson v. Stevens, 8 How. 384, 400; Merchants' Bank v. Union R. Co., 69 N. Y. 373; Bank of Rochester v. Jones, 4 N. Y. 497; Baltimore, etc., R. Co. v. Wilkens, 44 Md. 11; Nathans v. Giles, 5 Taunt. 558; Allen v. Williams, 12 Pick. 297; First Nat. Bank v. Dearborn, 115 Mass. 219; Holmes v. Germ. Sec. Bank, 87 Pa. St. 525; Campbell v. Alford, 57 Tex. 159; M. C. R. Co. v. Phillips, 60 Ill. 190; Davenport Bank v. Homeyer, 45 Mo. 145; Fowler v. Meikleham, 7 Low. Can. 367; Glidden v. Lucas, 7 Cal. 26; Dodge v. Meyer, 61 Cal. 405. That the consignor may show an intention to the contrary, see Alabama, etc., R. Co. v. Mt. Vernon Co., 84 Ala. 173, s. c. 4 So. R. 356.



as well as unconditional or in blank, and where it is so made the indorsee takes it subject to the conditions or restrictions.<sup>1</sup>

§ 1429. Rights of bona fide purchasers and other third persons who hold bills of lading.—As we have seen, the weight of authority is to the effect that where no goods are actually received by the carrier it is not liable upon a bill of lading even to a *bona fide* purchaser. But a question as to the rights of *bona fide* purchasers frequently arises in other cases where the goods have been delivered to the carrier. It has been held that a purchaser of a bill of lading who has reason to believe that his vendor was not the owner thereof, or that it was held to secure an outstanding draft, is not a *bona fide* purchaser and is not entitled to hold the goods covered by the bill against their true owner.<sup>2</sup> But a pledgee who holds the bill as collateral security for money loaned or advanced thereon has, in general, the same rights, so far as the exercise of them is necessary for his protection, as a purchaser for value, and, in the absence of anything to the contrary, is to that extent at least a *bona fide* purchaser.<sup>3</sup> So, it has been held that one who clothes another with *indicia* of ownership, thereby putting it

<sup>1</sup> Barrow v. Coles, 3 Camp. 92; Walley v. Montgomery, 3 East 585.

<sup>2</sup> Shaw v. Railroad Co., 101 U. S. 557. See Alderman v. Eastern R. Co., 115 Mass. 233; Mason v. Great Western R. Co., 31 U. C. Q. B. 73. This is true where a bill of lading is found or stolen by the transferrer and transferred by him to an innocent third party. Gurney v. Behrend, 3 El. & B. 622; Dows v. Perrin, 16 N. Y. 325; Barnard v. Campbell, 55 N. Y. 456; Emery v. Irving Nat. Bank, 25 Ohio St. 360; Moore v. Robinson, 62 Ala. 537. But if the bill of lading has been actually transferred by the real owner, although the assignment and transfer has been procured from the owner of the goods by fraud, the *bona fide* holder by purchase from the fraudu-

lent vendee will acquire a good title to the goods. Dows v. Greene, 24 N. Y. 638; Pease v. Gloahec, L. R. 1 Privy C. App. 219.

<sup>3</sup> Dows v. National, etc., Bank, 91 U. S. 618; Marine Bank v. Wright, 48 N. Y. 1; Tilden v. Minor, 45 Vt. 196; Dymock v. Missouri R. Co., 54 Mo. App. 400; Fifth Nat. Bank v. Bayley, 115 Mass. 228. See, also, Bank of Rochester v. Jones, 4 N. Y. 497; First Nat. Bank v. Crocker, 111 Mass. 163. As to the effect of such a pledge on the vendor's right of stoppage *in transitu*, see Missouri Pac. R. Co. v. Heidenhamer, 82 Tex. 195, s. c. 17 S. W. R. 608, and compare Dymock v. Missouri, etc., R. Co., 54 Mo. App. 400.

in his power to deal with a thing as his own, is estopped from asserting a better title as against a *bona fide* purchaser for value who has no knowledge of such title.<sup>1</sup> Where a firm was engaged in mercantile business at one station on a railroad and had a mill at another, and a member of such firm was the railroad agent at the latter place, but the business at both places was practically conducted at the former, it was held that the railroad company, having knowledge of the manner of conducting business, was liable to innocent holders of bills of lading taken as collateral by them, without knowledge of any irregularity, after delivery to the firm at the latter station of goods which had been shipped by them from the former station, the goods being delivered without presentation of the bills of lading.<sup>2</sup> But, in another case, where the railroad company was not in fault, it was held that it was not liable to a bank which had taken bills of lading for grain as security for a loan to the indorsee and had then permitted him to obtain possession of them, whereby he secured the grain from the company.<sup>3</sup> One who takes a bill of lading merely as security for, or in consideration of an antecedent indebtedness is not a *bona fide* purchaser for value.<sup>4</sup> But the surrender by a pledgee of a bill of

<sup>1</sup> *Dymock v. Missouri, etc., R. Co.*, 54 Mo. App. 400. See, also, *Wichita Sav. Bank v. Atchison, etc., R. Co.*, 20 Kan. 519, (a case to some extent contrary to the weight of authority); *Farmers', etc., Bank v. Erie R. Co.*, 72 N. Y. 188; *Western Union R. Co. v. Wagner*, 65 Ill. 197.

<sup>2</sup> *Walters v. Western, etc., R. Co.*, 56 Fed. R. 369. But see *Friedlander v. Texas, etc., R. Co.*, 130 U. S. 416, s. c. 9 Sup. Ct. R. 570; *Missouri Pac. R. Co. v. McFadden*, 154 U. S. 155, s. c. 14 Sup. Ct. R. 990. In the last case just cited it was held that a railroad company was not liable to an assignee without notice on bills of lading for cotton which, according to agreement and the course of dealing between the carrier and the shipper, had been left

in the possession of a compress company as agent for the shipper and before delivery to the carrier was destroyed by fire.

<sup>3</sup> *Douglas v. People's Bank*, 86 Ky. 176, s. c. 5 S.W. R. 420, citing *Newsom v. Thornton*, 6 East 17; *Hatfield v. Phillips*, 9 M. & W. 647; *Meyerstein v. Barber*, L. R., 2 C. P. 38.

<sup>4</sup> *Dymock v. Missouri, etc., R. Co.*, 54 Mo. App. 400; *Skilling v. Bollman*, 73 Mo. 665; *Loeb v. Peters*, 63 Ala. 243; *Harris v. Pratt*, 17 N. Y. 249; *Naylor v. Dennie*, 8 Pick. (Mass.) 198. See, also, *Busenbarke v. Ramey*, 53 Ind. 499; *Petry v. Ambroscher*, 100 Ind. 510. But see *contra* (under a statute) *Tiedeman v. Knox*, 53 Md. 612. We do not mean that such a consideration may not support the contract as

lading securing a loan has been held to be a sufficient consideration for the substitution, as security, of a bill of lading antedating the loan.<sup>1</sup>

§ 1430. **Duplicate bills.**—Where a bill of lading is issued in duplicate, one marked “Original” and one “Duplicate,” the duplicate is, in effect, an original.<sup>2</sup> But if the bill of lading given to the shipper and the duplicate retained by the carrier differ, the former controls.<sup>3</sup> A purchaser of goods to be paid for on delivery of the bill of lading is bound to pay on the tender of a duly indorsed bill which is effective to pass the property, notwithstanding that the bill was drawn in triplicate, and that all the copies were not tendered or accounted for.<sup>4</sup> If duplicate bills are given to the shipper who indorses one which is attached to a draft and forwards the other as a notice to the purchaser, the carrier must deliver only on the presentation of the indorsed copy.<sup>5</sup> Where a carrier issued original bills of lading to the order of the shipper, stating that the goods were in its possession to be delivered only on their presentation and not conditioned to be void in case of delivery on duplicate bills, it was held that the fact that duplicate bills were also issued and that the carrier had delivered the goods to the shipper on presentation and surrender of the duplicate bills did not relieve it from liability on the original bills to one who had taken them in good faith as pledgee to secure a loan made by him to the shipper upon

between the parties, but we refer to cases in which there are prior equities or the rights of innocent third parties are involved in some way.

<sup>1</sup> *Midland Nat. Bank v. Missouri Pac. R. Co.*, (Mo.) 33 S. W. R. 521.

<sup>2</sup> *Missouri P. R. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. R. 608.

<sup>3</sup> *The Thames*, 14 Wall. (U. S.) 98; *Ontario Bank v. Hanlon*, 23 Hun (N. Y.) 283.

<sup>4</sup> *Sanders v. MacLean*, L. R. 11 Q. B. Div. 327.

<sup>5</sup> *Weyand v. Atchison, etc., R. Co.*,

75 Iowa 573, 39 N. W. R. 899; *Congar v. Galena, etc., R.*, 17 Wis. 477; *Krulder v. Ellison*, 47 N. Y. 36; *Lawrence v. Minturn*, 17 How. 100; *Alderman v. Railroad*, 115 Mass. 233; *Merchants' Bank v. Union, etc., Transportation Co.*, 69 N. Y. 374; *Shaw v. Railroad Co.*, 101 U. S. 557; *McEwen v. Jeffersonville, etc., R. Co.*, 33 Ind. 368; *Newcomb v. Boston, etc., R.*, 115 Mass. 230. See as to the rule where the indorsed duplicate is obtained by fraud, *Shaw v. Railroad Co.*, 101 U. S. 557.

such bills.<sup>1</sup> It is frequently stated as a general rule, however, that where bills of lading are issued in "sets" or "parts" to the order of the shipper or consignee the property usually passes to the first indorsee or transferee, but the carrier is justified in delivering the goods to him on presentation by him of one of the parts or sets, although there has been a prior indorsement or assignment to another person for value of another set or part, provided the carrier has no notice or knowledge thereof and acts in good faith, but in most of the cases in which this rule is announced the bills of lading provided that, one of them "being accomplished, the other shall stand void," or contained some other similar provision.<sup>2</sup>

§ 1431. **Change of consignment by shipper.**—Where the conditions of shipment are not such that delivery to the carrier vests the title in the consignee,<sup>3</sup> the consignor, not having forwarded the bill to the consignee or his representative,<sup>4</sup> may, after surrendering to the carrier the bill and all copies thereof,<sup>5</sup> order the delivery to another consignee, even if the goods have at the time passed into the possession of a connecting carrier.<sup>6</sup> So, it has been held that where the consignor forbids a delivery to the consignee there is no presumption that the latter is the owner of the goods, and that the former, even after receiving a bill of lading, can make the delivery to the consignee conditional on the payment of a draft.<sup>7</sup>

<sup>1</sup> *Midland Nat. Bank v. Missouri Pac. R. Co.*, (Mo.) 33 S. W. R. 521.

<sup>2</sup> See *Glyn, etc., Co. v. East & West, etc., Co.*, L. R. 7 App. Cas. 591.

<sup>3</sup> See *supra* under sub-title *As Muni-ments of Title*. If the title has vested in the consignee the carrier may not, of course, permit a change of destination without the consignee's consent. *Philadelphia, etc., R. Co. v. Wireman*, 88 Pa. St. 264; *Bailey v. Hudson River, etc., R. Co.*, 49 N. Y. 70.

<sup>4</sup> *Blanchard v. Page*, 8 Gray, 281; *Mitchel v. Ede*, 11 Ad. & El. 888; *Ruck v. Hatfield*, 5 Barn. & Ald. 632; *Thompson v. Trail*, 2 Car. & P. 334.

<sup>5</sup> *Hubbersty v. Ward*, 8 Exch. 330.

<sup>6</sup> *Sutherland v. Second Nat. Bank*, 78 Ky. 250; *Chaffe v. Mississippi, etc., R.*, 59 Miss. 182.

<sup>7</sup> *Louisville, etc., R. Co. v. Hartwell*, (Ky.) 36 S. W. R. 183.

## CHAPTER LVIII.

### THE INITIAL CARRIER.

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| <p>§ 1432. Duties of initial carrier generally.</p> <p>1433. No extra-terminal liability unless by contract.</p> <p>1434. There may be liability by contract.</p> <p>1435. What constitutes such a contract.</p> <p>1436. Illustrative cases.</p> <p>1437. Authority of agents as to extra-terminal liability.</p> | <p>§ 1438. Exclusion of liability by contract.</p> <p>1439. Rule when statute makes initial carrier liable for negligence of others.</p> <p>1440. Liability for deviation or failure to obey instructions.</p> <p>1441. Actions on account of extra-terminal defaults.</p> |
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§ 1432. Duties of initial carrier generally.—As a general rule, no carrier is bound by law to accept and carry goods beyond the terminus of its own line. In the absence of any agreement, either express or clearly implied, for transportation beyond its own line, the common law duty of an independent carrier is performed by safely transporting the goods over its own line and delivering them to the consignee or connecting carrier, as the case may be.<sup>1</sup> If, in such a case, the goods are to be delivered by the initial carrier to a connecting carrier for further transportation, the former is considered as a forwarding agent rather than a carrier as to such further transportation, and is not liable for the default of subsequent carriers. Its whole duty is not always performed, however,

<sup>1</sup>See *post*, § 1449. As to what will and no business connection between not excuse it from delivery to the the two roads and no agent at their connecting carrier, see *Blodgett v. junction the first company is not liable for failure to deliver to such connecting carrier. St. Louis, etc., R. Co. v. Marrs, (Ark.) 31 S. W. R. 42.* *Abbot*, 72 Wis. 516, s. c. 40 N. W. R. 491, 7 Am. St. R. 873; *McLaren v. Detroit, etc., R. Co.*, 23 Wis. 138. Where there is no express contract

by merely tendering the goods to the connecting carrier. If the latter refuses to receive them, it is generally the duty of the initial carrier to notify the consignor or the consignee without unreasonable delay and to store or otherwise take care of the goods for a reasonable time while awaiting instructions,<sup>1</sup> and, in some cases, especially where the goods are known to be perishable, it may be the duty of the initial carrier as a forwarding agent or depository, if an emergency exists, to forward them by some other carrier, if the carrier designated is unable to receive them.<sup>2</sup> So, where instructions are given to it with the goods to be transmitted to succeeding carriers, it is the duty of such initial carrier to duly transmit them to the connecting carrier.<sup>3</sup> As we shall hereafter see, although the general rule is that an independent carrier is under no duty to transport goods beyond its own line, it may incur that obligation by holding itself out as a carrier beyond its own line or may become liable for the default of connecting carriers by contract or by reason of some custom or arrangement which entitles the shipper to treat them as partners.

**§ 1433. No extra-terminal liability unless by contract.**—The general rule is that a carrier is not liable beyond its own line unless by contract.<sup>4</sup> But if an initial carrier contracts

<sup>1</sup> *Lesinsky v. Great Western Dispatch*, 10 Mo. App. 134; *Louisville, etc., R. Co. v. Campbell*, 7 Heisk. (Tenn.) 253; *In re Petersen v. Case*, 21 Fed. R. 885; *post*, § 1449. See, also, *Railroad Co. v. Manufacturing Co.*, 16 Wall. (U. S.) 318.

<sup>2</sup> See *Regan v. Grand Trunk R. Co.*, 61 N. H. 579.

<sup>3</sup> *North v. Merchants' Transportation Co.*, 146 Mass. 315, s. c. 15 N. E. R. 779; *Little Miami R. Co. v. Washburn*, 22 Ohio St. 324; *Dana v. New York, etc., R. Co.*, 50 How. Pr. (N. Y.) 428; note in 40 Am. & Eng. R. Cas. 142. So it may be its duty to deliver a freight bill and voucher to the connecting company in accordance with custom.

*Reynolds v. Boston, etc., R. Co.*, 121 Mass. 291.

<sup>4</sup> *Berg v. Atchison, etc., R. Co.*, 30 Kan. 561; *Hunter v. So. P. R. Co.*, 76 Tex. 195, 13 S. W. R. 190; *Cincinnati, etc., R. Co. v. Pontius*, 19 Ohio St. 221; *McConnell v. Norfolk & W. R. Co.*, 86 Va. 218, 9 S. E. R. 1006; *Detroit, etc., R. Co. v. Farmers', etc., Bank*, 20 Wis. 122; *Sumner v. Walker*, 30 Fed. R. 261; *Gray v. Jackson*, 51 N. H. 9; *Crouch v. Louisville, etc., R. Co.*, 42 Mo. App. 248; *Piedmont M. Co. v. Columbia, etc., Railroad*, 19 S. C. 353; *Savannah, F. & W. R. Co. v. Harris*, 26 Fla. 148, 8 R. R. & Corp. L. J. 168, 42 Am. & Eng. R. Cas. 457, 7 So. 541; *Hunter v. Southern P. R.*

to deliver to a connecting line by a fixed time it will be liable for damages for injuries occurring on the connecting line because of the failure to deliver at the agreed time, the injuries being such as were reasonably to be anticipated and contemplated by the parties.<sup>1</sup> So, by holding itself out as a common carrier of goods to a point beyond its own line it may render itself liable for not receiving and carrying goods to such point.<sup>2</sup>

§ 1434. **There may be liability by contract.**—The carrier may contract so as to bind itself for the defaults of connecting carriers as well as for its own,<sup>3</sup> even though the extra-terminal carriage extend into another state or country.<sup>4</sup> This proposi-

Co., 76 Tex. 195, 42 Am. & Eng. R. Cas. 501, 13 S. W. R. 190; McConnell v. Norfolk & W. R. Co., 86 Va. 248, 13 Va. L. J. 594, 6 R. R. & Corp. L. J. 406, 40 Am. & Eng. R. Cas. 155, 17 Wash. L. R. 583, 9 S. E. R. 1006. As we shall hereafter see, however, the contract may sometimes be implied.

<sup>1</sup> Fox v. Boston, etc., R. Co., 148 Mass. 220, 19 N. E. R. 222, 1 L. R. A. 702.

<sup>2</sup> Chicago, etc., R. Co. v. Wolcott, 141 Ind. 267, s. c. 61 Am. & Eng. R. Cas. 135, 39 N. E. R. 451; Pittsburgh, etc., R. Co. v. Morton, 61 Ind. 539; Cobb v. Illinois Cent. R. Co., 38 Iowa 601. See, also, Ins. Co. v. Railroad Co., 104 U. S. 146.

<sup>3</sup> East Tennessee, etc., R. Co. v. Nelson, 1 Cold. 272; Baltimore, etc., Steamboat Co. v. Brown, 54 Pa. St. 77; Noyes v. Rutland, etc., R. Co., 27 Vt. 110; Peet v. Chicago, etc., Railway, 19 Wis. 118; Wahl v. Holt, 26 Wis. 703; Root v. Great Western R. Co., 45 N. Y. 524; Condict v. Grand Trunk R. Co., 54 N. Y. 500; Bryan v. Memphis & P. R. Co., 11 Bush 597; Southern Express Co. v. Shea, 38 Ga. 519; Pennsylvania R. Co. v. Berry, 68 Pa.

St. 272; Illinois Cent. R. Co. v. Cope-land, 24 Ill. 332; Illinois Cent. R. Co. v. Johnson, 34 Ill. 389; Wabash, etc., R. Co. v. Harris & Co., 55 Ill. App. 159; St. Louis, etc., R. Co. v. Piper, 13 Kan. 505; Quimby v. Vanderbilt, 17 N. Y. 306; Van Buskirk v. Roberts, 31 N. Y. 661; Jennings v. Grand T. R. Co., 52 Hun 227, 23 N. Y. S. R. 15, 5 N. Y. Supp. 140, affirmed in 127 N. Y. 438, 28 N. E. R. 394; Newell v. Smith, 49 Vt. 255; Myrick v. Michigan Cent. Railroad, 107 U. S. 102; Swift v. Pacific M. S. S. Co., 106 N. Y. 206, 12 N. E. R. 583; Davis v. Jacksonville, etc., Line, 126 Mo. 69, s. c. 28 S. W. R. 965; Page v. Chicago, etc., R. Co., (Dak.) 64 N. W. R. 137; Railroad Co. v. Pratt, 22 Wall. 123; Railroad Co. v. McCarthy, 96 U. S. 258. It may so contract, even though it is only a connecting line with that to which the goods were originally delivered by the shipper. Beard v. St. Louis, A. & T. H. Ry. Co., 79 Iowa 527, 44 N. W. R. 803. In Kansas, etc., R. Co. v. Bayles, 19 Colo. 348, s. c. 35 Pac. R. 704, a contract by a receiver to carry beyond the terminus of the line under his control was held valid.

<sup>4</sup> Burtis v. Buffalo, etc., R. Co., 24

tion, though now well established, was questioned in earlier cases on the ground that contracts for liability beyond termini specified in charters were *ultra vires*.<sup>1</sup> If the carrier thus contracts to carry to and deliver at a point on a connecting railroad, it may be liable for delay in delivery which occurs on the connecting road at the point to which the goods were consigned,<sup>2</sup> as well as for injury to the goods while in the hands of the connecting carrier.

§ 1435. What constitutes such a contract.—The English rule, as declared in *Muschamp's* case, is that a contract by the initial carrier for liability beyond its line may be inferred by the jury from the fact that it accepts goods directed to a point off its line without by positive agreement limiting its liability to the transportation on its line.<sup>3</sup> This rule has been followed

N. Y. 269; *Benett v. Peninsular S. Co.*, 6 Com. B. 775; *Phillips v. North Carolina Co.*, 78 N. Car. 294; *Lindley v. Richmond, etc., R. Co.*, 88 N. Car. 547, s. c. 9 Am. & Eng. R. Cas. 31; *McCarn v. International, etc., R. Co.*, 84 Tex. 352, s. c. 55 Am. & Eng. R. Cas. 406.

<sup>1</sup>See *Perkins v. Portland, etc., Railroad*, 47 Me. 573; *Western, etc., R. Co. v. McElwee*, 6 Heisk. 208; *Buffett v. Troy, etc., Railroad*, 40 N. Y. 168; *Root v. Great Western Railroad*, 45 N. Y. 524; *Hill Manufacturing Co. v. Boston, etc., Railroad*, 104 Mass. 122; *Noyes v. Rutland, etc., Railroad*, 27 Vt. 110; *Railroad Co. v. Pratt*, 22 Wall. 123; *Baltimore, etc., Steamboat Co. v. Brown*, 54 Pa. St. 77; *Schroeder v. Hudson River, etc., Railroad*, 5 Duer 55; *Bissell v. Michigan, etc., R. Co.*, 22 N. Y. 258; *Wilby v. West Cornwall Railway*, 2 Hurl. & N. 703. In Connecticut such contracts are still held to be void. *Hood v. New York, etc., Railroad*, 22 Conn. 502; *Naugatuck R. Co. v. Waterbury Button Co.*, 24 Conn. 468; *Converse v.*

*Norwich Transportation Co.*, 33 Conn. 166.

<sup>2</sup>*Savannah, etc., R. Co. v. Pritchard*, 77 Ga. 412, 1 S. E. R. 261; *Central, etc., R. Co. v. Georgia, etc., Exchange*, 91 Ga. 389, s. c. 17 S. E. R. 904, 55 Am. & Eng. R. Cas. 606; *Pereira v. Central R. Co.*, 66 Cal. 92.

<sup>3</sup>*Muschamp v. Lancaster & P. J. R. R. Co.*, 8 M. & W. 421; *Scothorn v. South, etc., Railway*, 8 Exch. 341; *Crouch v. Great Western Railway*, 2 Hurl. & N. 491; *Great Western R. Co. v. Crouch*, 3 Hurl. & N. 183; *Wilby v. West Cornwall Railway*, 2 Hurl. & N. 703; *Watson v. Ambergate Railway*, 15 Jur. 448; *Webber v. Great Western Railway*, 3 H. & C. 771. In *Grand Trunk R. Co. v. McMillan*, 16 Can. Sup. Ct. R. 543, 42 Am. & Eng. R. Cas. 468, it was held a contract by an initial carrier to carry goods over its own and connecting lines to their destination, providing that it shall not be liable for loss or damage occurring after the goods shall have arrived at the stations on the initial carrier's line nearest to the points to which



by many American courts.<sup>1</sup> The majority of our courts, however, have held, in accordance with what is called the American rule, that the mere acceptance of goods directed to a point off the carrier's line is not a sufficient basis for the implication of a contract for extra-terminal liability, and that, in the absence of an express contract, or of more significant facts or specifications than the fact of acceptance as the basis of an implied contract, the initial carrier is discharged by carrying safely to the end of its line and there delivering to the next carrier.<sup>2</sup> As to what will, under the American rule, constitute

they are consigned, or beyond its limits, will not relieve it from liability for loss or damage occurring during transportation beyond the limits of its own and on a connecting line.

<sup>1</sup> *Nashua Lock Company v. Worcester, etc., Railroad*, 48 N. H. 339; *Jennings v. Grand Trunk R. Co.*, 127 N.Y. 438, 28 N. E. R. 394, affirming 52 Hun 227, 5 N. Y. Supp. 140; *Ill. Cen. R. Co. v. Copeland*, 24 Ill. 332; *Alabama G. S. R. Co. v. Mt. Vernon Co.*, 84 Ala. 173, 4 So. 356; *Falvey v. Georgia R. Co.*, 76 Ga. 597, 2 Am. St. R. 58; *Savannah, F. & W. R. Co. v. Pritchard*, 77 Ga. 412, 4 Am. St. R. 92, 1 S. E. R. 261; *Ill. Cen. R. Co. v. Frankenberg*, 54 Ill. 88; *Chicago, etc., R. Co. v. People*, 56 Ill. 365; *Adams Ex. Co. v. Wilson*, 81 Ill. 339; *Carter v. Peck*, 4 Sneed (Tenn.) 203; *Western & At. R. Co. v. McElwee*, 6 Heisk. (Tenn.) 208; *Angle v. Mississippi, etc., Railroad*, 9 Iowa 487; *Beard v. St. Louis, A. & T. H. R. Co.*, 79 Iowa 527, 42 Am. & Eng. R. Cas. 509, 44 N. W. R. 803; *Bennett v. Filyaw*, 1 Fla. 403; *Weed v. Saratoga, etc., Railroad*, 19 Wend. 534; *Bradford v. South Car. Railroad*, 7 Rich. L. 201; *Mosher v. Southern Ex. Co.*, 38 Ga. 37; *Mobile, etc., R. Co. v. Copeland*, 63 Ala. 219; *Alabama, etc., R. Co. v. Mount Vernon Co.*, 84 Ala. 173, 4 So. R. 356; *Hansen v. Flint, etc., Rail-*

*road*, 73 Wis. 346; *Pereira v. Central Pac.*, 66 Cal. 92; *Halliday v. St. Louis, etc., R.*, 74 Mo. 159; *Atlanta, etc., R. Co. v. Texas G. Co.*, 81 Ga. 602; *Ohio, etc., R. Co. v. Emrich*, 24 Ill. App. 245; *Baltimore, etc., R. Co. v. Campbell*, 36 Ohio St. 647; *Wabash, etc., R. Co. v. Jaggerman*, 115 Ill. 407; *Louisville, etc., R. Co. v. Meyer*, 78 Ala. 597; *Ill. Cen. R. Co. v. Cowles*, 32 Ill. 116; *East Tenn., etc., R. Co. v. Brumley*, 9 Am. & Eng. R. Cas. 356; *Cummins v. Dayton, etc., R. Co.*, 5 Lea 401, 6 Am. & Eng. R. Cas. 356; *Atlanta & W. P. R. Co. v. Texas G. Co.*, 81 Ga. 602, 9 S. E. R. 600.

<sup>2</sup> *Rickerson R. M. Co. v. Grand Rapids, etc., R. Co.*, 67 Mich. 110; 32 Am. & Eng. R. Cas. 487; *Taylor v. Maine Cent. R. Co.*, 87 Me. 209, s. c. 32 Atl. R. 905; *Nutting v. Connecticut, etc., Railroad*, 1 Gray 502; *Darling v. Boston, etc., Railroad*, 11 Allen 295; *Perkins v. Portland, etc., Railroad*, 47 Me. 573; *Skinner v. Hall*, 60 Me. 477; *Inhabitants of Plantation v. Hall*, 61 Me. 517; *Brintnall v. Saratoga, etc., Railroad*, 32 Vt. 665; *McMillan v. Michigan, etc., Railroad*, 16 Mich. 79; *Baltimore, etc., R. Co. v. Schumacher*, 29 Md. 176; *Gray v. Jackson*, 51 N. H. 9; *Condict v. Grand Trunk R. Co.*, 54 N. Y. 500; *Root v. Great Western R. Co.*, 45 N. Y. 524; *Elmore v. Naugatuck Railroad*, 23 Conn. 457; *Irish v.*

a sufficient basis for the implication of a contract, nothing very definite can be said.<sup>1</sup> A contract will not necessarily be im-

Milwaukee, etc., Railroad, 19 Minn. 376; *Ortt v. Minneapolis, etc., R. Co.*, 36 Minn. 396, 31 N. W. R. 519; *Camden, etc., R. Co. v. Forsyth*, 61 Pa. St. 81; *Crawford v. Southern R. Association*, 51 Miss. 222; *Farmers' & M. Bank v. Champlain Trans. Co.*, 23 Vt. 186; *Railroad Co. v. Manf. Co.*, 16 Wall. 318; *Railroad Co. v. Pratt*, 22 Wall. 123; *VanSantvoord v. St. John*, 6 Hill 158; *Hood v. New York, etc., Railroad*, 22 Conn. 502; *Phillips v. North Car. Railroad*, 78 N. C. 294; *Harris v. Grand Trunk Railway*, 15 R. I. 371; *Knight v. Providence, etc., Railroad*, 13 R. I. 572; *Grover, etc., Co. v. Missouri Pac. Railway*, 70 Mo. 672; *Knott v. Raleigh, etc., Railroad*, 98 N. C. 73; *Berg v. Atchison, etc., Railroad*, 30 Kan. 561; *Snow v. Indiana, etc., R. Co.*, 109 Ind. 422, 9 N. E. R. 702; *Hill v. Burlington, etc., Railroad Co.*, 60 Iowa 196; *McConnell v. Norfolk, etc., R. Co.*, 86 Va. 248, 9 S. E. R. 1006; *Clyde v. Hubbard*, 88 Pa. St. 358; *Detroit, etc., R. Co. v. McKenzie*, 43 Mich. 609; *Myrick v. Michigan, etc., R. Co.*, 107 U. S. 102; *Savannah, etc., R. Co. v. Harris*, 26 Fla. 148, 7 So. R. 544; *Stewart v. Terre Haute, etc., R. Co.*, 1 McCrary 312, s. c. 3 Fed. R. 768; *Hadd v. United States, etc., Ex. Co.*, 52 Vt. 335; *Knott v. Raleigh, etc., R. Co.*, 98 N. C. 73, 3 S. E. R. 735, 2 Am. St. R. 321; *Hunter v. Southern P. R. Co.*, 76 Tex. 195, 42 Am. & Eng. R. Cas. 501, 13 S. W. R. 190; *International & G. N. R. Co. v. Tisdale*, 74 Tex. 8, 4 L. R. A. 545, 11 S. W. R. 900.

<sup>1</sup> As to such contracts see *Harris v. Grand Trunk Ry.*, 15 R. I. 371, 5 Atl. R. 305; *Ortt v. Minneapolis, etc., R. Co.*, 36 Minn. 396, 31 N. W. R. 519; *Quimby v. Vanderbilt*, 17 N. Y. 306;

*International, etc., R. Co. v. Tisdale*, 74 Tex. 8; *Berg v. Narragansett Steamship Co.*, 5 Daly 394; *Candee v. Pennsylvania Railroad*, 21 Wis. 582; *Railroad Co. v. Androscoggin Mills*, 22 Wall. 594; *Robinson v. Merchants' D. T. Co.*, 45 Iowa 470; *Root v. Great Western R. Co.*, 45 N. Y. 524; *Railroad Co. v. Pratt*, 22 Wall. 123; *Hill Man. Co. v. Boston, etc., Railroad*, 104 Mass. 122; *Gray v. Jackson*, 51 N. H. 9; *Woodward v. Illinois Cent. Railroad*, 1 Biss. 403; *Knight v. Portland, etc., Railroad*, 56 Me. 234; *Milnor v. New York, etc., R. Co.*, 53 N. Y. 363; *Nashville, etc., R. Co. v. Sprayberry*, 9 Heisk. 852; *Brooke v. Grand Trunk Railway*, 15 Mich. 332; *Hartan v. Eastern Railroad*, 114 Mass. 44; *Stimpson v. Connecticut, etc., Railroad*, 98 Mass. 83; *Ellsworth v. Tarrt*, 26 Ala. 733; *Kessler v. New York, etc., Railroad*, 7 Lans. 62; *Hood v. Railroad*, 22 Conn. 1; *Elmore v. Naugatuck Railroad*, 23 Conn. 457; *Sprague v. Smith*, 29 Vt. 421. The receipt considered in *Hansen v. Flint & P. M. R. Co.*, 73 Wis. 346, 41 N. W. R. 529, was as follows: "Shipped by R. P. & Co., the following articles, in good order, to be delivered in like good order, as addressed, without unnecessary delay." "Consigned to H. & K., Onekama, Mich." It was held that this was a contract to carry the goods to Onekama, there being nothing in the instrument limiting defendant's liability to its own route. For construction of contract by trustees in possession of a railroad, see *Tolman v. Abbot*, 78 Wis. 192, 47 N. W. R. 264. A railroad company which received goods at Akron, Pennsylvania, for St. Augustine, Florida, marked "via Philadelphia, care Atlantic Coast Line Fast

plied even from the shipper's payment or guaranty to the initial carrier of through freight.<sup>1</sup> An undertaking, however, in the receipt for the goods, "to forward" them beyond its line is generally held to bind the initial carrier for the entire carriage.<sup>2</sup> And the fact that the initial company named the through rate and collected the entire charge has been held, in some jurisdictions, to be a circumstance strongly tending to show a contract for through transportation by it or such a "connection in business" as to make the first carrier liable over the entire route.<sup>3</sup> What constitutes such a contract is a matter of gen-

Freight," and forwarded the goods from Philadelphia by steamer, was held liable for a loss by fire on the steamer. *Philadelphia, etc., R. Co. v. Beck*, 125 Pa. St. 620, 17 Atl. R. 505.

<sup>1</sup> *Illinois Cent. R. Co. v. Kerr*, 68 Miss. 14, 8 So. R. 330; *Ætna Ins. Co. v. Wheeler*, 49 N. Y. 616; *Camden R. Co. v. Forsyth*, 61 Pa. St. 81; *Lamb v. Camden, etc., R. Co.*, 46 N. Y. 271; *Piedmont Mfg. Co. v. Columbia, etc., R. Co.*, 19 S. Car. 353, s. c. 16 Am. & Eng. R. Cas. 194; *Hill v. Burlington, etc., Railroad*, 60 Iowa 196; *Washburn, etc., Co. v. Providence, etc., R. Co.*, 113 Mass. 490. See, also, *McConnell v. Norfolk, etc., R. Co.*, 86 Va. 248, s. c. 9 S. E. R. 1006; *Ft. Worth, etc., R. Co. v. Williams*, 77 Tex. 121, s. c. 13 S. W. R. 637, s. c. 42 Am. & Eng. R. Cas. 464. But a company receiving goods marked for delivery beyond its line and requiring of the shipper an advance deposit equal to the amount to be earned by the several carriers over the entire distance, is bound to so deliver the goods into the possession of the carrier connecting with it as to place the latter under the same obligation as if the goods had been received from the consignor with advance payment of freight. *Palmer v. Chicago, B. & Q. R. Co.*, 56 Conn.

137, 13 Atl. R. 818. A contract to transport and to deliver goods to the road's connecting lines for transportation to a destination off its line, at a fixed rate for the whole distance, held to be a through bill of lading. *Gulf, etc., R. Co. v. Vaughn, (Tex.)* 16 S. W. R. 775.

<sup>2</sup> *East Tennessee & Va. R. Co. v. Rogers*, 6 Heisk. 143, s. c. 19 Am. R. 589; *Cutts v. Brainerd*, 42 Vt. 566, s. c. 1 Am. R. 353; *St. Louis, etc., R. Co. v. Piper*, 13 Kan. 505; *Mercantile' Mut. Ins. Co. v. Chase*, 1 E. D. Smith, 115; *Nashua Lock Co. v. Worcester, etc., R. Co.*, 48 N. H. 339; *Wilcox v. Parmelee*, 3 Sand. 610; *Schroeder v. Hudson River, etc., R.*, 5 Duer 55; *Davis v. Jacksonville, etc., Line*, 126 Mo. 69, s. c. 28 S. W. R. 965; *Buckland v. Adams Ex. Co.*, 97 Mass. 124. But see *Reed v. United States Ex. Co.*, 48 N. Y. 462; *Dunbar v. Port Royal, etc., R. Co.*, 36 S. Car. 110, s. c. 55 Am. & Eng. R. Cas. 466; *American Ex. Co. v. Second Nat. Bank*, 69 Pa. St. 394; *Crawford v. Southern R. Assn.*, 51 Miss. 222.

<sup>3</sup> *Page v. Chicago, etc., R. Co.*, (S. Dak.) 64 N. W. R. 137; *Ogdensburg, etc., R. Co. v. Pratt*, 22 Wall. (U. S.) 123, 132; *Condict v. Grand Trunk R. Co.*, 4 Lans. 106; *Root v. Great West-*

eral law upon which the federal courts will exercise their own judgment, and the decisions of the state court are not binding upon them.<sup>1</sup>

§ 1436. **Illustrative cases.**—In Illinois, although the rule in Muschamp's case is followed in that state, it has been held that the receipt of goods in New York addressed to Bloomington, Illinois, did not bind the carrier to deliver the goods at Bloomington where the bill of lading, after acknowledging the receipt of the goods so addressed, specified that they were to be forwarded to "Chicago depot only."<sup>2</sup> So an offer by a common carrier to "take" peas from a point on its line to a point on another line *via* a certain route has been held to be merely an offer to take them for carriage over its own line and then to deliver them to the next carrier on the route named, to be forwarded by the latter.<sup>3</sup> In another case the agent of a railroad company received goods which the shipper desired to send to Monroe, Louisiana, a point beyond the terminus of such road, and executed a bill of lading acknowledging the receipt of such goods "to be laden on the freight car, 1 bale bedding, J. F. Phillips, Monroe, La., marks, etc., as per margin (condition of contents unknown) to — or assigns at — station," at the same time saying to the shipper that the goods would reach Monroe in good condition in a few days. The court held that this was not sufficient to show a special contract on the part of the company to carry to Monroe and there deliver the goods to the plaintiff.<sup>4</sup> In another case the carrier

ern R. Co., 45 N. Y. 532; Weed v. Saratoga, etc., R. Co., 19 Wend. (N. Y.) 534; Nashua Lock Co. v. Worcester, etc., R. Co., 48 N. H. 339; Chouteaux v. Leech, 18 Pa. St. 224; Camden v. Pennsylvania R. Co., 21 Wis. 582, s. c. 94 Am. Dec. 566; Hill, etc, Co. v. Boston, etc., R. Co., 104 Mass. 122. This, of course, would follow whenever the courts have adopted the rule in Muschamp's case, but in other jurisdictions the weight of authority is that such fixing of through rates and receiving payment

thereof is not of itself sufficient to make the carrier liable over the entire route.

<sup>1</sup> Myrick v. Michigan Cent. R. Co., 107 U. S. 102, s. c. 1 Sup. Ct. R. 425.

<sup>2</sup> Merchants', etc., Co. v. Moore, 88 Ill. 136, s. c. 30 Am. R. 541. See Wabash, etc., R. Co. v. Jaggerman, 115 Ill. 407, s. c. 4 N. E. R. 641.

<sup>3</sup> Harris v. Grand Trunk R., 15 R. I. 371, s. c. 5 Atl. R. 305, and note. See, also, Myrick v. Michigan Cent. R. Co., 107 U. S. 102, s. c. 1 Sup. Ct. R. 425.

<sup>4</sup> Phillips v. North Carolina R. Co.,

gave a receipt for the goods "in good order, to be delivered in like good order," and placed on the margin thereof the consignee's name and address, the latter being a point beyond defendant's line on a connecting road. Cards were also put on the goods giving the name and address of the consignee and the name of the connecting road. It was held that this did not constitute a contract for through carriage so as to render the first carrier liable for loss beyond its own line.<sup>1</sup> On the other hand, where a bill of lading was issued by an association of several railroads in the name of the association whereby it agreed, without naming any of the railroad companies, to carry goods from Boston to Chicago and there deliver them to connecting lines to be forwarded to Denver, it was held that it was a special through contract to Chicago, and that the constituent companies were liable jointly and severally for any loss or damage to the goods between Boston and Chicago, notwithstanding a provision that in case of loss or damage to the goods "that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening thereof."<sup>2</sup> Substantially the same view was taken by another court in a similar case recently decided.<sup>3</sup> In another case a box was delivered to a railroad company for shipment beyond its line, and a receipt was executed by it describing the goods with the consignee's name and address and containing a promise upon the part of the company to forward them by its railroad and deliver them "to — at its depot in —." The blanks were in a regular printed form and were so left

78 N. Car. 294. See, also, *Ortt v Minneapolis, etc., R. Co.*, 36 Minn. 396.

<sup>1</sup> *Wright v. Boughton*, 22 Barb. (N. Y.) 561.

<sup>2</sup> *Block v. Fitchburgh R. Co.*, 139 Mass. 308, s. c. 1 N. E. R. 348. The court construed the exemption from liability as referring to the acts or defaults of the companies beyond Chicago. See, also, *International, etc., R. Co. v. Tisdale*, 74 Tex. 8, s. c. 4 L. R. A. 545; *Cummins v. Dayton, etc.,*

*Co.*, 9 Am. & Eng. R. Cas. 36; *Baltimore, etc., Co. v. Brown*, 54 Pa. St. 77; *Milne v. Douglass*, 13 Fed. R. 37; *Clyde v. Hubbard*, 88 Pa. St. 358; *Lindley v. Richmond, etc., R. Co.*, 88 N. Car. 547, s. c. 9 Am. & Eng. R. Cas. 31. But compare *Hot Springs, etc., R. Co. v. Trippe*, 42 Ark. 465, s. c. 48 Am. R. 65.

<sup>3</sup> *Southard v. Minneapolis, etc., R. Co.*, 60 Minn. 382, s. c. 62 N. W. R. 442.

when the receipt was executed. It was held that this constituted a special contract to carry the goods to their destination although it was beyond the line of such company.<sup>1</sup> So, where a bill of lading was given for goods for shipment beyond the company's line and there was a stipulation in writing that such company should carry them to their destination at a certain fixed rate, it was held that this was a contract for through carriage by it, and that the written portion of the contract must prevail over the printed portion which tended to show that the company acted merely as a forwarding agent.<sup>2</sup>

**§ 1437. Authority of agents as to extra-terminal liability.**—The courts following the English rule announced in *Muschamp's case* hold that an agent's authority to receive goods for carriage implies authority to contract for extra-terminal liability,<sup>3</sup> while the others deny the implication.<sup>4</sup> Although a general freight agent may have this power, we think the better rule is that a local station agent has no such implied authority, unless he has in some manner been held out as having it. And it has been held that such authority will not be inferred from the mere fact that he has collected freight in the particu-

<sup>1</sup> *Cutts v. Brainerd*, 42 Vt. 566. This case can hardly be reconciled with some of those referred to in the first part of this section. See, however, *Fortier v. Pennsylvania Co.*, 18 Ill. App. 260.

<sup>2</sup> *Peet v. Chicago, etc., R. Co.*, 19 Wis. 118, s. c. 20 Wis. 594, 91 Am. Dec. 446.

<sup>3</sup> *Watson v. Ambergate Railway*, 15 Jurist 448; *Scothorn v. South, etc., Railway*, 8 Exch. 341; *Bristol, etc., R. Co. v. Collins*, 7 H. L. Cas. 194. It has been held unnecessary to prove the express authority of the agent to make such a contract, when he acted as such in the proper place for receiving goods for the company, and was in possession of the company's stamp to be used on such re-

ceipts. *Hansen v. Flint, etc., R. Co.*, 73 Wis. 346, 41 N. W. Rep. 529. But see *Turner v. St. Louis, etc.*, 20 Mo. App. 632; *Patterson v. Kansas City, etc., R. Co.*, 47 Mo. App. 570, and *Crouch v. Louisville, etc., R. Co.*, 42 Mo. App. 248, holding that a station agent or a soliciting agent has no power to make such agreement for the company, unless expressly conferred or implied from previous conduct. It is held in the same state, however, that a general freight agent has the power. *Grover, etc., M. Co. v. Missouri, etc., Railroad*, 70 Mo. 672; *White v. Missouri, etc., Railroad*, 19 Mo. App. 400.

<sup>4</sup> *Burroughs v. Norwich, etc., R. Co.*, 100 Mass. 26, s. c. 1 Am. R. 78.

lar instance for the transportation of the goods to their destination on a connecting line.<sup>1</sup> Nor has the general freight agent of the receiving line implied authority to bind a connecting line by fixing the freight rate over it.<sup>2</sup> But the authority of an agent to contract for carriage beyond the terminus of the line of his company, or the like, may sometimes be implied from the fact that he is held out to the world as having such authority, or has been permitted to exercise it in other cases.<sup>3</sup>

§ 1438. **Exclusion of liability by contract.**—All extra-terminal liability may be excluded by the carrier by an express contract.<sup>4</sup> This would seem to follow from the common law

<sup>1</sup> *Coates v. Chicago, etc., R. Co.*, (S. Dak.) 65 N. W. R. 1067; *Page v. Chicago, etc., R. Co.*, (S. Dak.) 64 N. W. R. 137. In *Railroad Co. v. Pratt*, 22 Wall. (U. S.) 123, 131, 132, it was held a question of fact for the jury. See, also, *Wood v. Chicago, etc., R. Co.*, 59 Iowa 196.

<sup>2</sup> *Hill v. Burlington, etc., R. Co.*, 60 Iowa 196, s. c. 9 Am. & Eng. R. Cas. 21. See, also, *Gulf, etc., R. Co. v. Clarke*, 5 Tex. Civ. App. 547.

<sup>3</sup> See *Railroad Co. v. Pratt*, 22 Wall. (U. S.) 123, 131, 132; *Mayall v. Boston, etc., R. Co.*, 19 N. H. 122, s. c. 49 Am. Dec. 149; *Wilcox v. Chicago, etc., R. Co.*, 24 Minn. 269; *Pruitt v. Hannibal, etc., R. Co.*, 62 Mo. 527; *Gulf, etc., R. Co. v. Cole*, (Tex.) 28 S. W. R. 391.

<sup>4</sup> *Illinois Cent. R. Co. v. Frankenberg*, 54 Ill. 88; *Berg v. Atchison, etc., Railroad*, 30 Kan. 561; *Alabama, etc., R. Co. v. Thomas*, 83 Ala. 343, 3 So. R. 802; *Jones v. Cincinnati, etc., Railway*, 89 Ala. 376; *Myrick v. Michigan, etc., R. Co.*, 107 U. S. 102; *Hunter v. Southern Pac. Railroad*, 76 Tex. 195; *Texas, etc., R. Co. v. Hawkins*, (Tex.) 30 S. W. R. 1113; *Ortt v. Minneapolis, etc., Railway*, 36 Minn. 396;

*Illinois Cent. R. Co. v. Scruggs*, 69 Miss. 418, s. c. 13 So. R. 698; *Harris v. Grand Trunk Railway*, 15 R. I. 371; *McConnell v. Norfolk, etc., R. Co.*, 86 Va. 248, 9 S. E. R. 1006; *Tolman v. Abbot*, 78 Wis. 192, 47 N. W. R. 264; *Pendergast v. Adams Ex. Co.*, 101 Mass. 120; *American Ex. Co. v. Second N. Bank*, 69 Pa. St. 394; *United States Ex. Co. v. Rush*, 24 Ind. 403; *McEacheran v. Michigan Cent. R. Co.*, 101 Mich. 264, s. c. 59 N. W. R. 612; *Inhabitants of Plantation v. Hall*, 61 Me. 517; *Smith v. American Exp. Co.*, (Mich.) 66 N. W. R. 479; *Rickerson, etc., Co. v. Grand Rapids, etc., Railroad*, 67 Mich. 110; *Detroit, etc., R. Co. v. McKenzie*, 43 Mich. 609; *Beaumont v. Canadian B. R. Co.*, *Montreal L. R.* 5 Super. Ct. 255; *Grand Trunk R. Co. v. McMillan*, 16 Can. Sup. Ct. R. 543, 42 Am. & Eng. R. Cas. 468; *Central R. & Bkg. Co. v. Avant*, 80 Ga. 195, 5 S. E. R. 78; *Ohio & M. R. Co. v. Emrich*, 24 Ill. App. 245; *Bethea v. Northeastern R. Co.*, 26 S. Car. 91, 1 S. E. R. 372. *Contra*, *Baker v. Missouri P. R. Co.*, 34 Mo. App. 98. If the bill provides that there shall be no liability for negligence of connecting lines, the carrier is not responsi-

rule that a carrier is not bound to receive and transport goods beyond its own line.<sup>1</sup> Such a limiting contract is valid as to interstate commerce,<sup>2</sup> and has been held binding, even though the shipper could not read, and was not aware that the limiting clause was in the bill.<sup>3</sup> It has been held, however, that such a contract must be specially pleaded by the railroad company,<sup>4</sup> and where the connecting lines over which a through shipment is made are partners, such a contract limiting the liability of each to its own line and providing that it shall not be responsible for the negligence of any of the others, has been held invalid as against public policy.<sup>5</sup> In such a case it vir-

ble for delay in delivering goods in time for a particular market, where it is not shown the delay occurred on its own line. *Mobile & O. R. Co. v. Francis*, (Miss.) 9 So. R. 508. Such a contract having been made, it is proper to refuse to direct a verdict for defendant where the evidence fails to show that the goods were delivered safely to the connecting line. *Georgia Pac. Ry. Co. v. Hughart*, 90 Ala. 36, 8 So. R. 62.

<sup>1</sup> *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 667, s. c. 4 Sup. Ct. R. 185; *Pittsburgh, etc., R. Co. v. Morton*, 61 Ind. 539, s. c. 28 Am. R. 682; *Lotspeich v. Central R. Co.*, 73 Ala. 306; *Richmond, etc., R. Co. v. Shomo*, 90 Ga. 496, s. c. 16 S. E. R. 220.

<sup>2</sup> *Texas, etc., R. Co. v. Adams*, 78 Tex. 372, 14 S. W. R. 666.

<sup>3</sup> *Jones v. Cincinnati, etc., R. Co.*, 89 Ala. 376, 8 So. R. 61, distinguishing *Louisville, etc., R. Co. v. Meyer*, 78 Ala. 597, s. c. 27 Am. & Eng. R. Cas. 44. It has been held a question for the jury to determine whether the terms of a receipt or bill of lading, limiting liability to the carrier's own line, were fairly understood and assented to by the consignor. *Ohio, etc., R. Co. v. Emrich*, 24 Ill. App. 245; *Chicago,*

*etc., R. Co. v. Montfort*, 60 Ill. 175. But this may be conclusively presumed in the absence of fraud or mistake where the shipper accepts and acts upon it. *Mulligan v. Illinois Cent. R. Co.*, 36 Iowa 181. See, also, *Texas, etc., R. Co. v. Adams*, 78 Tex. 372, s. c. 14 S. W. R. 666; *Hadd v. United States, etc., Co.*, 52 Vt. 335, s. c. 6 Am. & Eng. R. Cas. 443; *Phifer v. Carolina Cent. R. Co.*, 89 N. Car. 311.

<sup>4</sup> *Missouri Pac. R. Co. v. Wichita, etc., Co.*, 55 Kan. 525, s. c. 40 Pac. R. 899; *Atchison, etc., R. Co. v. Bryan*, (Tex. C. App.) 28 S. W. R. 98. See, also, *Schaeffer v. Philadelphia, etc., R. Co.*, 168 Pa. St. 209, s. c. 31 Atl. R. 1088; *Western Transp. Co. v. Newhall*, 24 Ill. 466; *Gaines v. Union, etc., Co.*, 28 Ohio St. 418. But compare *Crum v. Yundt*, 12 Ind. App. 308, s. c. 40 N. E. R. 79; *Baltimore, etc., R. Co. v. Ragsdale*, (Ind. App.) 42 N. E. R. 1106, 1107.

<sup>5</sup> *Gulf, etc., R. Co. v. Wilbanks*, 7 Tex. C. App. 489, 27 S. W. R. 302; *Gulf, etc., R. Co. v. Wilson*, 7 Tex. C. App. 128, 26 S. W. R. 131; *International, etc., R. Co. v. Tisdale*, 74 Tex. 8, s. c. 11 S. W. R. 900, 4 L. R. A. 545; *Merchants', etc., Co. v. Bloch*, 86 Tenn. 392, s. c. 6 Am. St. R. 847. But, see *Weinberg v. Albemarle, etc.,*



tually amounts to a contract by the carrier against liability for its own negligence. So, where several railroad companies had formed a traffic association and goods were shipped over their line under a bill of lading which provided that in case of loss or damage "that company alone shall be held answerable therefor in whose actual custody the same may be at the time of such loss, detriment or damage," it was held that this did not relieve the first carrier from liability for the refusal of one of its associates to receive the goods.<sup>1</sup> It was also held, in the same case, that where unqualified receipts were given, containing no exemption from liability, and these were afterward canceled and bills of lading issued in lieu thereof, containing an exemption from liability, without any other change in the terms of the contract, such stipulation for exemption was not binding in the absence of anything to show some consideration therefor.

**§ 1439. Rule where statute makes initial carrier liable for negligence of others.**—The rule that a carrier may contract against extra-terminal liability has been applied even where a statute provided that a common carrier receiving property "to be transferred from one place to another within or without the state," or "issuing receipts or bills of lading in the state," should be liable for loss or injury to such property caused by its negligence or the negligence of any common carrier to which such property might be delivered or over whose line it might pass. It was held that the effect of the statute of which we have just given the substance was simply to prescribe a definite rule of evidence, substantially the same as the English rule, whereby a *prima facie* liability would be established in the absence of a specific contract against extra-terminal liability.<sup>2</sup> In a more recent case, however, the same court modified some

R. Co., 91 N. Car. 31, s. c. 18 Am. & Eng. R. Cas. 597.

<sup>1</sup>Southard v. Minneapolis, etc., R. Co., 60 Minn. 382, s. c. 62 N. W. R. 442, 619. But see Cincinnati, etc., R. Co. v. Pontius, 19 Ohio St. 221.

<sup>2</sup>Dimmitt v. Kansas City, etc., R. Co., 103 Mo. 433, s. c. 15 S. W. R. 761. Followed in Nines v. St. Louis, etc., R. Co., 107 Mo. 475, s. c. 18 S. W. R. 26. See, also, Watkins v. St. Louis, etc., R. Co., 44 Mo. App. 245.

of the statements in the former decisions and held that while a carrier could, under such statute, limit its contract of carriage to the terminus of its own route, it could not contract for a through shipment and at the same time exempt itself from liability on account of the negligence of the connecting carriers.<sup>1</sup> It was held that even as applied to a contract for transportation beyond the limits of the state the statute was not invalid as regulating or interfering with interstate commerce.<sup>2</sup> Other cases showing the rule under particular statutes are cited below.<sup>3</sup>

**§ 1440. Liability for deviation or failure to obey instructions.**—It is, in general, the duty of the initial carrier to obey the instructions of the shipper as to the route, mode of carriage and the like,<sup>4</sup> and it should also transmit the instructions of the shipper to the connecting carrier.<sup>5</sup> Where the route and connecting carrier are not specified it may usually select them for itself,<sup>6</sup> but if they are specified it will become responsible

<sup>1</sup> *McCann v. Eddy*, (Mo.) 33 S. W. R. 71.

<sup>2</sup> Citing *Hart v. Chicago, etc., R. Co.*, 69 Ia. 485, s. c. 29 N. W. R. 597; *Solan v. Chicago, etc., R. Co.*, (Ia.) 63 N. W. R. 692; *Bagg v. Wilmington, etc., R. Co.*, 109 N. Car. 279, s. c. 14 S. E. R. 79.

<sup>3</sup> *Falvey v. Georgia R.*, 76 Ga. 597, s. c. 2 Am. St. R. 58; *Joseph v. Georgia R. Co.*, 88 Ga. 426, s. c. 14 S. E. R. 591; *Chicago, etc., R. Co. v. Church*, 12 Ill. App. 17; *King v. Macon, etc., R. Co.*, 62 Barb. (N. Y.) 160; *Burtis v. Buffalo, etc., R. Co.*, 24 N. Y. 269; *Root v. Great Western, etc., R. Co.*, 45 N. Y. 524; *Gulf, etc., R. Co. v. Adair*, 4 Tex. App. (Civil Cases) 55, s. c. 14 S. W. R. 1076; *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, s. c. 17 L. R. A. 643; *Miller v. South Carolina R. Co.*, 33 S. Car. 359, s. c. 9 L. R. A. 833, 11 S. E. R. 1093.

<sup>4</sup> *Michigan, etc., R. Co. v. Day*, 20 Ill. 375, s. c. 71 Am. Dec. 278; *Proctor v. Eastern R. Co.*, 105 Mass. 512;

*Davis v. Garrett*, 6 Bing. 716; *Sleat v. Fagg*, 5 Barn. & Ald. 342; *Stewart v. Merchants', etc., Co.*, 47 Iowa 229, s. c. 29 Am. R. 476; *Philadelphia, etc., R. Co. v. Beck*, 125 Pa. St. 620; *Express Co. v. Kountze*, 8 Wall. (U. S.) 342; *Sager v. Portsmouth, etc., R. Co.*, 31 Me. 228, s. c. 50 Am. Dec. 659. See, also, *Illinois Cent. R. Co. v. Tronstine*, 64 Miss. 834; *Wright v. Northern, etc., R. Co.*, 8 Phila. (Pa.) 19; *Ponkey v. Richmond, etc., R. Co.*, 3 Inters. Com. Rep. 806; *Pennsylvania R. Co. v. Stern*, 119 Pa. St. 24.

<sup>5</sup> *North v. Merchants' Transp. Co.*, 146 Mass. 315; *Palmer v. Chicago, etc., R. Co.*, 56 Conn. 137, s. c. 13 Atl. R. 818; *Little Miami R. Co. v. Washburn*, 22 Ohio St. 324; *Pankey v. Richmond, etc., R. Co.*, 3 Inters. Com. Rep. 33.

<sup>6</sup> *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 667; *Snow v. Indiana, etc., R. Co.*, 109 Ind. 422; *Mattingly v. Pennsylvania Co.*, 2 Inters. Com. Rep. 806; *Patten v. Union Pac. R. Co.*, 29 Fed.

as an insurer for unnecessary deviation, even though it had not contracted for a through shipment otherwise than as a forwarding agent,<sup>1</sup> or had expressly limited its liability as a common carrier to its own line or the like.<sup>2</sup> There are, however, cases in which an emergency may arise which will justify a deviation.<sup>3</sup> But the burden of showing such an emergency has been held to rest upon the carrier.<sup>4</sup> If there is no emergency, but for some reason the connecting carrier can not or will not receive the goods, it is generally the duty of the initial carrier to notify the shipper or owner and await instructions.<sup>5</sup> The consent of the parties interested will, of course, justify the carrier in the deviation from the original route.<sup>6</sup> And it has been held that where there is nothing in the bill of lading or other final written contract specifying the route or re-

R. 590; Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., 37 Fed. R. 567, s. c. 2 L. R. A. 289. It should, however, as a general rule select the ordinary route or one equally safe and cheap. Pankey v. Richmond, etc., R. Co., 3 Inters. Com. Rep. 33; Wells, Fargo, etc., Co. v. Fuller, 4 Tex. Civ. App. 213; Merchants', etc., Co. v. Kahn, 76 Ill. 520; Crosby v. Fitch, 12 Conn. 410.

<sup>1</sup> Wilcox v. Parmelee, 3 Sandf. (N. Y.) 610; Johnson v. New York, etc., R. Co., 33 N. Y. 610; Philadelphia, etc., R. Co. v. Becks, 125 Pa. St. 620, s. c. 17 Atl. R. 505; Goodrich v. Thompson, 44 N. Y. 324; Isaacson v. New York, etc., R. Co., 94 N. Y. 278, s. c. 46 Am. R. 142; Independence Mills Co. v. Burlington, etc., R. Co., 72 Iowa 535, s. c. 2 Am. St. R. 258; Louisville, etc., R. Co. v. Odill, (Tenn.) 33 S. W. R. 611; Brown, etc., Co. v. Pennsylvania Co., (Minn.) 65 N. W. R. 961.

<sup>2</sup> Galveston, etc., R. Co. v. Allison, 59 Tex. 193, s. c. 12 Am. & Eng. R. Cas. 28; Dunseth v. Wade, 3 Ill. 285; Merrick v. Webster, 3 Mich. 268; Fat-

man v. Cincinnati, etc., R. Co., 2 Disn. (Ohio) 248; Robertson v. National, etc., Co., 17 N. Y. Supp. 459; Maghee v. Camden, etc., R. Co., 45 N. Y. 514; Robinson v. Merchants', etc., Co., 45 Iowa 470; Collins v. Bristol, etc., R. Co., 11 Exch. 790.

<sup>3</sup> Johnson v. New York, etc., R. Co., 33 N. Y. 610, s. c. 88 Am. Dec. 416; Regan v. Grand Trunk R. Co., 61 N. H. 579.

<sup>4</sup> Le Sage v. Great Western R. Co., 1 Dely (N. Y.) 306; Ackley v. Kellogg, 8 Cow. (N. Y.) 223.

<sup>5</sup> Goodrich v. Thompson, 44 N. Y. 324; Hand v. Baynes, 4 Whart. (Pa.) 204, s. c. 33 Am. Dec. 54; Alabama, etc., R. Co. v. Thomas, 89 Ala. 294, s. c. 7 So. R. 762; Louisville, etc., R. Co. v. Odill, (Tenn.) 33 S. W. R. 611. See, also, Levy v. Louisville, etc., R. Co., 35 La. Ann. 615; Johnson v. New York, etc., R. Co., 33 N. Y. 610.

<sup>6</sup> Hedricks v. Steamship Morning Star, 18 La. Ann. 353. But see as to when acceptance of goods and payment of freight will not amount to a waiver. Brown, etc., Co. v. Pennsylvania Co., (Minn.) 65 N. W. R. 961.

stricting the right of the carrier to select its own agency or the route over which the goods are to be forwarded, parol evidence is inadmissible to show that the carrier agreed to forward them over a particular route at the time the bill of lading was executed.<sup>1</sup>

§ 1441. **Actions on account of extra-terminal defaults.**—The English rule is that, a contract for extra-terminal liability having been expressly made with the initial carrier or being implied, the shipper's only action for damages for default, no matter upon what line it occurs, is against such initial carrier.<sup>2</sup> This rule has been followed in this country only in Georgia,<sup>3</sup> the courts of all other states holding that the shipper may have his action against the carrier in default,<sup>4</sup> or against the initial carrier where it has, expressly or impliedly, become liable as a

<sup>1</sup> *White v. Ashton*, 51 N. Y. 280; *Hinckley v. New York, etc., R. Co.*, 56 N. Y. 429; *Snow v. Indiana, etc., R. Co.*, 109 Ind. 422; *Indianapolis, etc., R. Co. v. Remmy*, 13 Ind. 518.

<sup>2</sup> For the reason that there is no privity of contract between connecting carriers and the shipper. *Collins v. Bristol, etc., Ry. Co.*, 11 Exch. 790; *Coxon v. Great Western Ry. Co.*, 5 Hurl. & N. 274; *Mytton v. Midland, etc., Ry. Co.*, 4 Hurl. & N. 615; *Grand Trunk R. Co. v. McMillan*, 16 Can. Sup. Ct. R. 543, 42 Am. & Eng. R. Cas. 468.

<sup>3</sup> *Mosher v. Southern Ex. Co.*, 38 Ga. 37; *Southern Ex. Co. v. Shea*, 38 Ga. 519. The Georgia Code, § 2084, provides that where there are several connecting railroads under different companies, and goods are intended to be transported over more than one road, each company shall be responsible only to its own terminus, and until delivery to the connecting road, the last company which received the goods in good order being liable to the consignee for any damage thereto. In

*Falvey v. Georgia R. Co.*, 76 Ga. 597, it was held that this statute applies only in the absence of an express or implied contract to carry to the destination, and the English rule was re-announced that a contract for extra-terminal liability will be implied from the reception of goods for transportation to a point beyond the initial carrier's line. But see the Georgia case cited in the following note.

<sup>4</sup> *Illinois Cent. R. Co. v. Cowles*, 32 Ill. 116; *Anchor Line v. Dater*, 68 Ill. 369; *Chicago, etc., R. Co. v. Northern Line Packet Co.*, 70 Ill. 217; *Aigen v. Boston, etc., R. Co.*, 132 Mass. 423, s. c. 6 Am. & Eng. R. Cas. 426; *Barter v. Wheeler*, 49 N. H. 9; *Nashua Lock Co. v. Worcester, etc., R. Co.*, 48 N. H. 339, s. c. 2 Am. R. 242; *Southern Ex. Co. v. Hess*, 53 Ala. 19; *Conkey v. Milwaukee, etc., R. Co.*, 31 Wis. 619; *Halliday v. St. Louis, etc., Ry.* 74 Mo. 159; *Packard v. Taylor*, 35 Ark. 402; *International, etc., R. Co. v. Tisdale*, 74 Tex. 8. See, also, *Johnson v. East Tennessee, etc., R. Co.*, 90 Ga. 810, s. c. 17 S. E. R. 121.

common carrier for through carriage of the goods.<sup>1</sup> In some jurisdictions, as we have seen, the English rule is so far adopted as to make the initial carrier liable upon an implied contract for extra-terminal liability where no such contract would be implied under what is known as the "American rule," but in none of the states with the possible exception of Georgia, is the English rule adopted to the full extent of requiring the initial carrier alone to be sued even where another carrier has been guilty of the default. So, as we have seen, there are cases in which there is a joint and several liability upon the ground that as to the plaintiff the connecting carriers are partners.

<sup>1</sup> *Richardson v. The Charles P. etc., R. Co.*, 27 Vt. 110; *Hill Mfg. Co. Chouteau*, 37 Fed. R. 532; *Railroad v. Boston, etc., R. Co.*, 104 Mass. 122, *Co. v. Pratt*, 22 Wall. (U. S.) 123; s. c. 6 Am. R. 202; *Jennings v. Grand Hart v. Rensselaer, etc., R. Co.*, 8 Trunk R. Co., 127 N. Y. 438, s. c. 49 N. Y. 37, s. c. 59 Am. Dec. 447; *Am. & Eng. R. Cas.* 98; *Central R., Chouteaux v. Leech*, 18 Pa. St. 224; etc., *Co. v. Georgia, etc., Co.*, 91 Ga. 389, s. c. 17 S. E. R. 904; *Davis v. Bradford v. South Carolina, etc., R. Co.*, 7 Rich. L. 201, s. c. 62 Am. Dec. 411; *Wyman v. Chicago, etc., R. Co.*, s. c. 28 S. W. R. 965; *Bank of Kentucky v. Adams Ex. Co.*, 93 U. S. 174, 4 Mo. App. 35; *Noyes v. Rutland*,

## CHAPTER LIX.

### CONNECTING CARRIERS.

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| <p>§ 1442. ¶ Definition.</p> <p>1443. Commencement of connecting carrier's liability.</p> <p>1444. Liability for defaults of the initial or of other connecting carriers.</p> <p>1445. Liability as partner—What constitutes.</p> <p>1446. Effect of initial carrier's contract on connecting carrier.</p> <p>1447. Liability for defaults of common agent.</p> | <p>§ 1448. Liability for their own defaults.</p> <p>1449. Extent and termination of liability.</p> <p>1450. Presumption against last carrier.</p> <p>1451. Rights and liabilities as to charges.</p> <p>1452. Liability of carriers as between themselves—Action over.</p> |
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§ 1442. **Definition.**—"A connecting carrier," according to the definition quoted by Hutchinson<sup>1</sup> from a recent case,<sup>2</sup> "is one whose route, not being the first one, lies somewhere between the point of shipment and the point of destination. It becomes such by virtue of the agreement between the consignor or shipper and the first carrier, whereby the latter undertakes to deliver the shipment at its ultimate destination, and thus makes the carrier beyond its own route its agent for continuing the transportation, or else undertakes only to deliver the goods safely to the next carrier on the route, who thus becomes the agent of the shipper for carrying them farther." But a railroad company which receives loaded cars from another company, over whose line they have been transported to its own, and transfers them by means of a switch engine over a portion of its own track to their destination, receiving compensation therefor, from the former company, is a

<sup>1</sup> Hutchinson on Carriers, (2d ed.) since affirmed in 93 Mo. 331, s. c. 6 S. § 157a.

<sup>2</sup> Nanson v. Jacob, 12 Mo. App. 125,

connecting carrier and liable as a common carrier for the loss of the same by fire while in its possession as such, no matter how short the distance may be.<sup>1</sup>

§ 1443. **Commencement of connecting carrier's liability.**—The connecting carrier's liability begins with the actual delivery to it,<sup>2</sup> or with such notification as, under the usages of business, constitutes a constructive delivery.<sup>3</sup> It is not rendered liable by the fact that the preceding carrier has unloaded the goods and stored them in a warehouse.<sup>4</sup> So, where a part of a lot of goods had been unloaded from a steamboat and placed

<sup>1</sup> *Missouri Pac. R. Co. v. Wichita, etc., Co.*, 55 Kan. 525, s. c. 40 Pac. R. 899. In this case the court said: "The distance over which freight is hauled, whether in car-load lots or in less quantities, whether in its own cars or those belonging to connecting carriers, can make no difference with the capacity in which the company acts. A railroad transporting a passenger or a car-load of freight one mile, using a switch engine for motive power, is just as much a common carrier as if the distance were a thousand miles by regular freight or passenger train." But see *Missouri Pac. R. Co. v. Young*, 25 Neb. 651, s. c. 41 N. W. R. 646; *Western, etc., R. Co. v. Exposition Cotton Mills*, 81 Ga. 522.

<sup>2</sup> *Condon v. Marquette, etc., R. Co.*, 55 Mich. 218, 18 Am. & Eng. R. R. Cas. 574; *Petersen v. Case*, 21 Fed. R. 885, 18 Am. & Eng. R. Cas. 578; *Insurance Co. v. Railroad Co.*, 104 U. S. 146; *Lesinsky v. Great W. D. Co.*, 10 Mo. App. 134; *Goold v. Chapin*, 20 N. Y. 259; *Miller v. Steam Navigation Co.*, 10 N. Y. 431; *Reynolds v. Boston, etc., Railroad*, 121 Mass. 291; *Kentucky, etc., Ins. Co. v. Western, etc., Railroad*, 8 Baxt. 268; *Gray v. Jackson*, 51 N. H. 9; *Regan v. Grand Trunk Railroad*, 61 N. H. 579; *McKay v. New York Cent. Railroad*, 50 Hun 563;

*Alabama, etc., R. Co. v. Mt. Vernon Co.*, 84 Ala 173.

<sup>3</sup> It has been held that constructive delivery is good only as between the carriers, and that the shipper may look only to the carrier who has actual possession. *Goold v. Chapen*, 20 N. Y. 259; *Conkey v. Milwaukee, etc., R. Co.*, 31 Wis. 619, overruling *Wood v. Milwaukee, etc., R. Co.*, 27 Wis. 541; *McDonald v. Western Railroad Corp.*, 34 N. Y. 497; *Condon v. Marquette, etc., Railroad*, 55 Mich. 218. But see *Van Santvoord v. St. John*, 6 Hill 157; *Converse v. Norwich, etc., Trans. Co.*, 33 Conn. 166; *Pratt v. Ry. Co.* 95, U. S. 43; *Mills v. Michigan, etc., Railroad*, 45 N. Y. 622. It has been held, however, that the owner may recover from the carrier to whom a constructive delivery has been made. *Ætna Ins. Co. v. Wheeler*, 49 N. Y. 616. See *ante*, §1412, as to what constitutes a sufficient delivery to a connecting carrier.

<sup>4</sup> *Lesinsky v. Great W. D.*, 10 Mo. App. 134; *Railroad C. v. Manufacturing Co.*, 16 Wall. 318; *Irish v. Milwaukee, etc., Railway*, 19 Minn. 376; *West. Trans. Co. v. Newall*, 24 Ill. 466; *Merchants' Des. Co. v. Kahn*, 76 Ill. 520; *Louisville & N. R. R. v. Campbell*, 7 Heisk. 253; *Brintnall v. Saratoga, etc., Railroad*, 32 Vt. 665; *Blossom v.*

in the car of a connecting carrier and the rest of the articles had been pointed out and were ready to be taken from the boat, it was held that there was no complete delivery of the latter, either actual or constructive, and that the railroad company was not liable for those destroyed by fire while still upon the steamboat.<sup>1</sup> But evidence that fourteen boxes of goods were delivered to the initial carrier, and sealed in a car and that such car, still sealed, was delivered to the connecting carrier has been held sufficient to charge the latter with the receipt of that number of boxes of goods.<sup>2</sup> Considering the fact, however, that freight cars of one road are constantly being used by others, mere proof that the initial carrier delivered goods into the cars of a connecting carrier has been held insufficient to establish a complete delivery and notice to it that they were to be carried by it over its own road.<sup>3</sup>

**§ 1444. Liability for defaults of the initial or of other connecting carriers.**—A connecting carrier can not, as a rule, be held for the default of the initial or of other connecting carriers in the absence of a partnership, express or implied.<sup>4</sup> Thus, where tobacco was damaged while in the hands of a third connecting carrier, it was held that the carrier which received it from the initial carrier was not liable therefor, although the receipt given by the initial company stated that the company to which it should deliver the tobacco should be regarded as

Griffin, 13 N. Y. 569; Mills v. Michigan, etc., Railroad, 45 N. Y. 622; Root v. Great Western Railroad, 45 N. Y. 524; Michaels v. New York, etc., Railroad, 30 N. Y. 564; Regan v. Grand Trunk Railway, 61 N. H. 579; McKay v. New York, etc., Railroad, 50 Hun 563; Whitworth v. Erie, etc., R. Co., 87 N. Y. 413; Condon v. Marquette, etc., Railroad, 55 Mich. 218; Condict v. Grand Trunk E. Co., 54 N. Y. 500; McDonald v. Western R. R. Co., 34 N. Y. 497; Ayers v. Western Railroad Corp., 14 Blatchf. 9.

<sup>1</sup> Gass v. New York, etc., R. Co., 99 Mass. 220, s. c. 96 Am. Dec. 742.

<sup>2</sup> Newport News, etc., R. Co. v. Mendell, (Ky.) 34 S. W. R. 1081.

<sup>3</sup> Patten v. Union Pac. R. Co., 29 Fed. R. 590.

<sup>4</sup> Montgomery, etc., R. Co. v. Moore, 51 Ala. 394; Knott v. Raleigh, etc., R. Co., 98 N. Car. 73, s. c. 2 Am. St. R. 321; Hill v. Burlington, etc., R. Co., 60 Iowa 196; Lowenburg v. Jones, 56 Miss. 688, s. c. 31 Am. R. 379; Wehmann v. Minneapolis, etc., R. Co., 58 Minn. 22, s. c. 59 N. W. R. 546.



the agent of the owner.<sup>1</sup> So, where goods were lost by a prior carrier, it was held that the last carrier could not be held liable for the loss.<sup>2</sup> But sometimes, because of the relation of principal and agent, and, more frequently, because of a partnership relation existing between them, one connecting carrier has been held liable for the default of another. Such partnerships for joint carriage may be formed,<sup>3</sup> and when existing, either expressly or impliedly, any or all of the members may be held for the defaults of each.<sup>4</sup>

§ 1445. **Liability as partner—What constitutes partnership.**—Partnership liability of connecting carriers to third persons may exist without liability to each other.<sup>5</sup> “Where

<sup>1</sup> *Knott v. Raleigh, etc., R. Co.*, 98 N. Car. 73, s. c. 2 Am. St. R. 321.

<sup>2</sup> *Lowenburg v. Jones*, 56 Miss. 688, s. c. 31 Am. R. 379. So, where the last carrier shows that the goods were damaged to the same extent when received by it. *Gulf, etc., R. Co. v. Malone, (Tex.)* 25 S. W. R. 1077. So, where there is no evidence that the goods were ever delivered to the last carrier. *Chicago, etc., R. Co. v. Goldman*, 46 Ill. App. 625. See, also, *Church v. Atchison, etc., R. Co.*, 1 Okla. 44, s. c. 29 Pac. R. 530.

<sup>3</sup> *Swift v. Pacific, etc., Steamship Co.*, 106 N. Y. 206; *Aigen v. Boston, etc., Railroad*, 132 Mass. 423; *Block v. Fitchburg, etc., R. Co.*, 139 Mass. 308; *Gass v. New York, etc., R. Co.*, 99 Mass. 220; *Hot Springs R. Co. v. Trippe*, 42 Ark. 465; *Insurance Co. v. Railroad Co.*, 104 U. S. 146; *Barter v. Wheeler*, 49 N. H. 9; *Wylde v. Northern R. Co.*, 53 N. Y. 156.

<sup>4</sup> *Weyland v. Elkins*, Holt N. P. 227; *Waland v. Elkins*, 1 Starkie 217; *Laughter v. Pointer*, 5 B. & C. 547; *Carter v. Peck*, 4 Sneed 203; *Cobb v. Abbot*, 14 Pick. 289; *Fremont v. Coupland*, 2 Bing. 170; *Champion v. Bostwick*, 18 Wend. 175; *Bostwick v.*

*Champion*, 11 Wend. 571, *Atchison, etc., R. Co. v. Grant*, 6 Tex. C. App. 674, 26 S. W. R. 286.

<sup>5</sup> *Champion v. Bostwick*, 11 Wend. 571, 18 Wend. 175; *Pattison v. Blanchard*, 5 N. Y. 186; *Block v. Fitchburg R. Co.*, 139 Mass. 308; *Hill Mfg. Co. v. Boston, etc., Railroad*, 104 Mass. 122; *Wyman v. Chicago, etc., Railroad Co.*, 4 Mo. App. 35. As to conditions from which a partnership will be implied, see, *Cincinnati, etc., R. Co. v. Spratt*, 2 Duvall 4; *Judson v. Western Railroad*, 4 Allen 520; *Straiton v. New York, etc., Railroad*, 2 E. D. Smith 184; *Hood v. New York, etc., Railroad*, 22 Conn. 1; *Bowman v. Hilton*, 11 Ohio 303; *Ricketts v. Baltimore, etc., Railroad*, 4 Lans. 446; *Harp v. The Grand Era*, 1 Woods (C. C.) 184; *Barter v. Wheeler*, 49 N. H. 9; *Fairchild v. Slocum*, 19 Wend. 329; *Slocum v. Fairchild*, 7 Hill 292; *Hartan v. Eastern R. Co.*, 114 Mass. 44; *Washburn Manfg. Co. v. Providence, etc., R. R.*, 113 Mass. 490; *Croft v. Baltimore, etc., Railroad*, 1 McArthur 492; *Skinner v. Hall*, 60 Me. 477; *Wilson v. Chesapeake, etc., Railroad*, 21 Gratt. 654; *Darling v. Boston, etc., Railroad*, 11 Allen 295; *Burroughs v. Norwich*,

carriers over different routes have associated themselves under a contract for a division of the profits of the carriage in certain proportions, or of the receipts from it after deducting any of the expenses of the business, they become jointly liable as partners to third persons.”<sup>1</sup> But “where the agreement is that each shall bear the expenses of his own route and of the transportation upon it, and that the gross receipts shall be divided in proportion to distance or otherwise, they are partners neither *inter se* nor as to third persons, and incur no joint liability.”<sup>2</sup> Nor does the establishment by two or more carriers of joint or through rates make them joint carriers or one of them liable for the default of another.<sup>3</sup>

etc., R. Co., 100 Mass. 26; *Milnor v. N. Y. etc., R. Co.*, 53 N. Y. 363; *Brooke v. Grand Trunk, R. Co.*, 15 Mich. 332; *Nashua Lock Company v. Worcester, etc., Railroad*, 48 N. H. 339; *Gray v. Jackson*, 51 N. H. 9; *Fitchburg, etc., R. R. v. Hanna*, 6 Gray 539; *Lowell Wire Fence Co. v. Sargent*, 8 Allen 189; *Hempstead v. New York, etc., R. Co.*, 28 Barb. 485; *Baltimore, etc., R. Co. v. Wilkens*, 44 Md. 11.

<sup>1</sup> *Hutchinson on Carriers*, (2d ed.) § 169; *Champion v. Bostwick*, 18 Wend. 175; *Bostwick v. Champion*, 11 Wend. 571; *Hart v. Rensselaer, etc., R. Co.*, 8 N. Y. 37, s. c. 59 Am. Dec. 447; *Peterson v. Chicago, etc., R. Co.*, 80 Iowa 92, s. c. 45 N. W. R. 573. See, also, *Barter v. Wheeler*, 49 N. H. 9, s. c. 6 Am. R. 434; *Nashua, etc., Co. v. Worcester, etc., R. Co.*, 48 N. H. 339, s. c. 2 Am. R. 242; *Cincinnati, etc., R. Co. v. Spratt*, 2 Duv. 4; *Swift v. Pacific, etc., Co.*, 106 N. Y. 206; *Bradford v. South Carolina R. Co.*, 7 Rich. L. 201, s. c. 62 Am. Dec. 411; *Coates v. United States Exp. Co.*, 45 Mo. 238; *Pearce v. Madison, etc., R. Co.*, 21 How. (U. S. 441.

<sup>2</sup> *Hutchinson on Carriers*, (2d ed.) § 169; *Pattison v. Blanchard*, 5 N. Y. 186; *Converse v. Norwich, etc., T. Co.*,

33 Conn. 166; *Hot Springs, etc., R. Co. v. Trippe*, 42 Ark. 465, s. c. 48 Am. R. 65; *Gass v. New York, etc., R. Co.*, 99 Mass. 220; *Irvin v. Nashville, etc., R. Co.*, 92 Ill. 103; *Briggs v. Vanderbilt*, 19 Barb. 222; *Peterson v. Chicago, etc., R. Co.*, 80 Iowa 92, s. c. 45 N. W. R. 573; *Swift v. Pacific, etc., Steamship Co.*, 106 N. Y. 206; *Insurance Co. v. Railroad Co.*, 104 U. S. 146; *Citizens' Insurance Co. v. Kountz Line*, 4 Woods 268; *Milne v. Douglass*, 4 McCrary 368; *Deming v. Norfolk, etc., R. Co.*, 21 Fed. R. 25; *Ellsworth v. Tartt*, 26 Ala. 733; *Montgomery, etc., R. Co. v. Moore*, 51 Ala. 394.

<sup>3</sup> *Wehmann v. Minneapolis, etc., R. Co.*, 58 Minn. 22, s. c. 59 N. W. R. 546; *Fort Worth, etc., R. Co. v. Johnson*, 5 Tex. Civ. App. 24, s. c. 23 S. W. R. 827; *Summer v. Walker*, 30 Fed. R. 261; *Railroad Co. v. Pratt*, 22 Wall. (U. S.) 123. But see *Burke v. Concord R. Co.*, 61 N. H. 160; *Harp v. The Grand Era*, 1 Woods (U. S.) 184; *Texas, etc., R. Co. v. Parrish*, 1 Tex. App. (Civil Cas.) 529; *Wyman v. Chicago, etc., R. Co.*, 4 Mo. App. 35; *International, etc., R. Co. v. Tisdale*, 74 Tex. 8, s. c. 4 L. R. A. 545; *Richardson v. The Charles P. Chouteau*, 37 Fed. R. 532.

§ 1446. **Effect of initial carrier's contract on connecting carriers.**—If a connecting railroad company is designated as such in the initial carrier's bill of lading, or if the bill provides that all stipulations shall enure to the benefit of all the carriers, then, having accepted the goods thereunder without any separate agreement, it becomes virtually a party to the contract, bound by the undertakings therein and benefited by the limitations.<sup>1</sup> If, however, the connecting carriers are not designated but are left to the initial carrier's selection, and there is no provision that the stipulations shall enure to the benefit of any other carrier, the connecting carrier may not claim the benefit of the original contract, and when it accepts the goods it does so under the law.<sup>2</sup> So, where the connecting carrier on receiving the goods, gave a receipt containing different provisions, it was held that it thereby lost the right to avail itself of provisions for its benefit in the receipt given by the first carrier.<sup>3</sup> And it has also been held that a connecting carrier can not be considered as ratifying the original contract where, in receiving and transporting the goods, it merely does what a valid statute requires it to do.<sup>4</sup>

<sup>1</sup> *Adams Ex. Co. v. Harris*, 120 Ind. 73, s. c. 21 N. E. R. 340; *United States Ex. Co. v. Harris*, 51 Ind. 127; *St. Louis, etc., R. Co. v. Weakly*, 50 Ark. 397, s. c. 7 Am. St. R. 104; *Halliday v. St. Louis, etc., R. Co.*, 74 Mo. 159, 41 Am. R. 309; *Railroad Co. v. Androscoggin Mills*, 22 Wall. 594; *Maghee v. Camden, etc., R. Co.*, 45 N. Y. 514, s. c. 6 Am. R. 125; *Lamb v. Camden, etc., R. Co.*, 46 N. Y. 271; *Whitworth v. Railroad Co.*, 87 N. Y. 413; *Fairbanks & Co. v. Cincinnati, etc., R. Co.*, 66 Fed. R. 471; *Kiff v. Atchison, etc., R. Co.*, 32 Kan. 263, s. c. 4 Pac. R. 401; *Western R. Co. v. Harwell*, 97 Ala. 341, s. c. 11 So. R. 781.

<sup>2</sup> *Adams Ex. Co. v. Harris*, 120 Ind. 73, s. c. 21 N. E. R. 340; *Martin v. American Ex. Co.*, 19 Wis. 336; *Bancraft v. Merchants', etc., Co.*, 47 Iowa

262, 29 Am. R. 482; *Merchants', etc., Co. v. Bolles*, 80 Ill. 473; *Camden, etc., R. Co. v. Forsyth*, 61 Pa. St. 81; *Ætna Ins. Co. v. Wheeler*, 49 N. Y. 616; *Crawford v. Great Western R. Co.*, 18 U. C. C. P. 510; *Central R., etc., Co. v. Bridger*, 94 Ga. 471, s. c. 20 S. E. R. 349. But see *Western R. Co. v. Harwell*, 97 Ala. 341, s. c. 11 So. R. 781. See, also, note *Wells v. Thomas*, 27 Mo. 17, 72 Am. Dec. 228, 242.

<sup>3</sup> *Browning v. Goodrich, etc., Co.*, 78 Wis. 391, s. c. 47 N. W. R. 428. See, also, *Gordon v. Great Western R. Co.*, 25 U. C. C. P. 488.

<sup>4</sup> *Gulf, etc., R. Co. v. Dwyer*, 75 Tex. 572, s. c. 7 L. R. A. 478; *Gulf, etc., R. Co. v. Baird*, 75 Tex. 256, s. c. 12 S. W. R. 530. This, however, is not free from doubt, for it would seem that the connecting carrier might re-

§ 1447. **Liability for defaults of common agent.**—The employment by connecting carriers of a common agent may render them jointly liable for his, but not for each other's defaults.<sup>1</sup> But such an agent, having authority, may sometimes by contract to carry over all the lines, render one liable for the default of another, at least where the enterprise is joint.<sup>2</sup> We think the fact that they have a common agent may be taken into consideration with other circumstances as tending to show a partnership or joint enterprise, and if they hold him out as having authority to make them jointly liable he may do so in favor of one who rightfully relies on the apparent authority, although he has in fact no such authority.<sup>3</sup>

§ 1448. **Liability for their own defaults.**—As already stated, a connecting carrier is, in all states except Georgia, liable in an action by the shipper for its own defaults.<sup>4</sup> Consequently, proof that the goods had been lost or damaged somewhere in transit would not necessarily render liable one connecting carrier not a partner of the others. If there is no assumption of extra-terminal liability by the initial carrier and no partnership, the defaulting carrier must be charged singly and the default located as occurring on its line.<sup>5</sup> But if the act which

ceive and transport the goods as required by the statute, upon different terms from those specified in the contract with the initial carrier, and that it should make a special contract as to such terms if it desires not to be held to have adopted the original contract.

<sup>1</sup> Hutchinson on Carriers, (2d ed) § 169; Cobb v. Abbot, 14 Pick. 289; Briggs v. Vanderbilt, 19 Barb. 222. See, also, Smith & Elliott v. Missouri, etc., R.Co., 58 Mo. App. 80; Ellsworth v. Tartt, 26 Ala. 733.

<sup>2</sup> See Hart v. Rensselaer, etc., R. Co., 8 N. Y. 37, s. c. 59 Am. Dec. 447; Cincinnati, etc., R. Co. v. Spratt, 2 Duv. 4; Braithwaite v. Power, 1 N. D. 455; Southern Pac. R. Co. v. Duncan, 16 Ky. L. R. 119; Swift v. Pacific Mail, etc., Co., 106 N. Y. 206.

<sup>3</sup> See Dye v. Virginia, etc., R. Co., 9 Mackey (D.C.) 63; Quimby v. Vanderbilt, 17 N. Y. 306, s. c. 72 Am. Dec. 469; ante, § 1438.

<sup>4</sup> Ante, § 1442. And in Georgia this is now the rule in some cases under the statute. Ga. Code, § 2084; Western, etc., R. Co. v. Exposition Cotton Mills, 81 Ga. 522.

<sup>5</sup> Midland Railway v. Bromley, 17 Com. B. 372, s. c. 33 Eng. L. & Eq. 235; Gilbert v. Dale, 5 Ad. & El. 543; Anchor Line v. Dater, 68 Ill. 369; Chicago, etc., R. Co. v. Northern, etc., Co., 70 Ill. 217. See, also, Boston, etc., R. Co. v. Ordway, 140 Mass. 510; Montgomery, etc., R. Co. v. Culver, 75 Ala. 578, s. c. 51 Am. R. 483; Marquette, etc., R. Co. v. Kirkwood, 45 Mich. 51, s. c. 40 Am. R. 453. This

occasions the loss or injury is that of the carrier against whom the action is brought it may be liable although the injury or loss did not develop or was not discovered until after delivery to a succeeding carrier. Thus, where cattle are poisoned by the negligence of the prior carrier or are not properly fed and watered by it the fact that such cattle did not die until after they were delivered to a succeeding carrier will not relieve the carrier in default from liability, if their death was caused by its failure to perform its duty.<sup>1</sup> So, as we shall hereafter show, as it is easier for the carrier than for the shipper to trace the goods and as a state of facts once shown to exist is presumed to continue, the last carrier is frequently held liable, in the absence of anything to the contrary, upon the presumption that the loss occurred upon its line.

**§ 1449. Extent and termination of liability.**—It is the duty of an intermediate connecting carrier, in the absence of any special agreement or custom to the contrary, not only to carry the goods safely over its own line but also to deliver them to the next succeeding carrier on the route, with proper instructions, if necessary, as to their further carriage, and it is not relieved of its responsibility as a common carrier by storing them in a warehouse at the end of its line without delivery or notice to the next carrier.<sup>2</sup> This

last case applies the rule in favor of the last carrier, as well as intermediate carriers, and, contrary to the weight of authority, denies that there is any presumption that the goods were received by it in good order, or that the loss occurred on its line.

<sup>1</sup> *Norfolk, etc., R. Co. v. Harman*, (Va.) 22 S. W. R. 490; *Galveston, etc., R. Co. v. Herring*, (Tex.) 24 S. W. R. 939; *Fort Worth, etc., R. Co. v. Daggett*, 87 Tex. 322, s. c. 28 S. W. R. 525. So held where goods were damaged because of unsuitable cars furnished by the first carrier, which were transported to their destination with seals unbroken.

*Alabama, etc., R. Co. v. Searles*, 71 Miss. 744, s. c. 16 So. R. 255; *Searles v. Alabama, etc., R. Co.*, 69 Miss. 186, s. c. 13 So. R. 815; *Hunt v. Nutt*, (Tex. C. App.) 27 S. W. R. 1031; *Indianapolis, etc., R. Co. v. Strain*, 81 Ill. 504.

<sup>2</sup> *Irish v. Milwaukee, etc., R. Co.*, 19 Minn. 376; *Hempstead v. New York, etc., R. Co.*, 28 Barb. (N. Y.) 485; *McDonald v. Western R. Co.*, 34 N. Y. 497; *Bancroft v. Merchants', etc., Co.*, 47 Iowa 262; *Philadelphia, etc., R. Co. v. Lehman*, 56 Md. 209, s. c. 40 Am. R. 415, 6 Am. & Eng. Cas. 194; *Rickerson, etc., Co. v. Grand Rapids, etc., R. Co.*, 67 Mich. 110; *Alabama,*

liability as a common carrier continues until delivery to the next carrier or due notice is given and a reasonable time has elapsed for the latter to receive the goods.<sup>1</sup> But where the carrier's responsibility is limited to its own line it is not liable for delay occasioned by the inability or refusal of the next carrier to receive them.<sup>2</sup> It is its duty, however, as a general rule, where the next carrier refuses to take the goods to use reasonable diligence to notify the consignor or the consignee and to take care of them in the mean time.<sup>3</sup> But failure to give such notice will not render the carrier liable if it would not have prevented the loss and no injury was occasioned by reason of such failure.<sup>4</sup> A carrier can not violate a contract and at the same time claim the benefit of such contract, and

etc., *R. Co. v. Thomas*, 89 Ala. 294, s. c. 7 So. R. 762. But see *Melbourne v. Louisville, etc.*, R. Co., 88 Ala. 443, s. c. 6 So. R. 762. It has no right to assume, without cause, that the succeeding carrier will refuse to receive them. *Railroad Co. v. Manufacturing Co.*, 16 Wall. (U. S.) 318; *Blodgett v. Abbot*, 72 Wis. 516, s. c. 7 Am. St. R. 873. But, after notice and refusal or the lapse of a reasonable time, the carrier may store them and become liable only as a warehouseman. *Nutting v. Connecticut, etc., R. Co.*, 1 Gray (Mass.) 502; *Rawson v. Holland*, 59 N. Y. 611, s. c. 17 Am. R. 394. See, also, *Hornthal v. Roanoke, etc., Co.*, 107 N. Car. 76; *American Exp. Co. v. Smith*, 33 Ohio St. 511, s. c. 31 Am. R. 561; *Gray v. Jackson*, 51 N. H. 9, s. c. 12 Am. R. 1; *Nashville, etc., R. Co. v. David*, 6 Heisk. (Tenn.) 261, s. c. 19 Am. R. 594. There may, however, be cases where it should forward them by some other route if the carrier to which they are first tendered will not receive them. *Ray on Freight Carriers*, 389.

<sup>1</sup> *Wehmann v. Minneapolis, etc., R. Co.*, 58 Minn. 22, s. c. 59 N. W. R.

546. Deposit of notice in a box in its own depot where the next carrier was accustomed to look for such notices has been held sufficient notice. *Mills v. Michigan Cent. R. Co.*, 45 N. Y. 622;

<sup>2</sup> *Palmer v. Atchison, etc., R. Co.*, 101 Cal. 178, s. c. 35 Pac. R. 630, 61 Am. & Eng. R. Cas. 235. See, also, *Central R., etc., Co. v. Skellie*, 86 Ga. 686, s. c. 12 S. E. R. 1017. But compare *Southard v. Minneapolis, etc., R. Co.*, 60 Minn. 382, s. c. 62 N. W. R. 442, 619, 11 Lewis' Am. R. & Corp. R. 629.

<sup>3</sup> *Lesinsky v. Great Western Despatch*, 10 Mo. App. 134; *Goold v. Chapin*, 20 N. Y. 259; *Whitworth v. Erie R. Co.* 87 N. Y. 413; *Condon v. Marquette, etc., R. Co.*, 55 Mich. 218; *The Convoy's Wheat*, 3 Wall. (U. S.) 225; *Louisville, etc., R. Co. v. Campbell*, 7 Heisk. (Tenn.), 253, 261; *In re Peterson v. Case*, 21 Fed. R. 885; *Georgia, etc., R. Co. v. Cole*, 68 Ga. 623; *Denver, etc., R. Co. v. DeWitt*, 1 Colo. App. 419; *Johnson v. New York, etc., R. Co.*, 39 How. Pr. (N. Y.) 127.

<sup>4</sup> *Regan v. Grand Trunk R. Co.*, 61 N. H. 579.

whether it is the initial carrier or an intermediate carrier, it may become liable for the loss of goods or injury thereto by a succeeding carrier where, in the absence of an emergency and without any necessity, it has deviated from the route prescribed by its contract or instructions and forwarded the goods over another route or in another manner.<sup>1</sup> But to render the intermediate carrier liable for deviation or to affect its rights in such a case it must, as a general rule at least, have notice that a particular route is specified or of the limitations in the authority of the prior carrier.<sup>2</sup> It has also been held that where a common carrier receives goods known by it to be perishable it must exercise due care and diligence to protect them and must carry them in suitable cars, if such cars are in use, and that it can not escape liability for not carrying them safely upon the ground that they were delivered to it by a preceding carrier in sealed cars and that it was customary to haul such cars received from the preceding carrier without inspecting or changing the goods to other cars, nor upon the ground that the freight charged was for transportation in common cars and that it had no refrigerator cars such as were required to keep the goods in perfect condition.<sup>3</sup> But in another recent case it was held that where goods are improperly loaded in sealed cars there is no duty resting upon the connecting carrier to open the cars and inspect their contents in the absence of knowledge that they are of such a character as to require such attention.<sup>4</sup> Although, as we have elsewhere

<sup>1</sup> *Georgia R. Co. v. Cole*, 68 Ga. 623; *Johnson v. New York, etc., R. Co.*, 33 N. Y. 610, s. c. 88 Am. Dec. 416, and note; *Robinson v. Merchants', etc., Co.*, 45 Iowa 470; *Hinckley v. New York, etc., R. Co.*, 56 N. Y. 429; *Galveston, etc., R. Co. v. Allison*, 59 Tex. 193; *Fatman v. Cincinnati, etc., R. Co.*, 2 Disney (Ohio) 248; *Independence, etc., Co. v. Burlington, etc., R. Co.*, 72 Iowa 535, s. c. 2 Am. St. R. 258.

<sup>2</sup> See *Price v. Denver, etc., R. Co.*, 12 Colo. 402, s. c. 21 Pac. R. 188; *Pat-*

*ten v. Union Pac. R. Co.*, 29 Fed. R. 590; *Louisville, etc., R. Co. v. Odill* (Tenn.) s. c. 33 S. W. R. 611; *Missouri, etc., R. Co. v. Stoner*, 5 Tex. Civ. App. 50, s. c. 23 S. W. R. 1020.

<sup>3</sup> *Beard & Sons v. Illinois Cent. R. Co.*, 79 Iowa 518, s. c. 18 Am. St. R. 381, 44 N. W. R. 800, 7 L. R. A. 280. See, also, *Dixon v. Richmond, etc., R. Co.*, 74 N. Car. 538; *Hamilton v. Des Moines, etc., R. Co.*, 36 Iowa 31; *Cartwright v. Rome, etc., R. Co.*, 85 Hun 517, s. c. 33 N. Y. Supp. 147.

<sup>4</sup> *McCarthy v. Louisville, etc., R. Co.*,

seen,<sup>1</sup> one railroad company may be liable as a common carrier of the cars of another company, yet it has been held, in the absence of a controlling custom or contract, that a connecting carrier is under no obligation to take freight in the cars in which it is tendered, transport it in such cars when it has cars of its own not in use, and pay the owner of such cars mileage for their use,<sup>2</sup> and that it is no defense for it to show that the injury to the freight was caused by a defective car furnished by the preceding carrier and used by the carrier sued in transporting the freight over its own line in accordance with the contract between the preceding carrier and the shipper.<sup>3</sup>

§ 1450. **Presumption against last carrier.**—When goods are delivered to the first carrier in good order and are afterwards injured, the presumption, in the absence of anything to the contrary, is that they were injured by the last carrier.<sup>4</sup> It

102 Ala. 193, s. c. 14 So. R. 370, 61 Am. & Eng. R. Cas. 178.

<sup>1</sup> *Ante*, § 1394.

<sup>2</sup> Oregon, etc., R. Co. v. Northern Pac. R. Co., 51 Fed. R. 465, 472.

<sup>3</sup> Wallingford v. Columbia, etc., R. Co., 26 S. Car. 258, s. c. 2 S. E. R. 19.

<sup>4</sup> Texas, etc., R. Co. v. Barnhart, 5 Tex. C. App. 601, 23 S. W. R., 801; Texas, etc., R. Co. v. Adams, 78 Tex. 372, s. c. 22 Am. St. R. 56, and note; Lake Erie, etc., R. Co. v. Oakes, 11 Ill. App. 489; Lindley v. Richmond etc., R. Co., 88 N. Car. 547, s. c. 9 Am. & Eng. R. Cas. 31; Flynn v. St. Louis, etc., R. Co., 43 Mo. App. 424; Savannah, etc., R. Co. v. Harris, 26 Fla. 148, s. c. 7 So. R. 544, 23 Am. St. R. 551; Mobile, etc., R. Co. v. Tupelo, etc., Co., 67 Miss. 35, s. c. 7 So. R. 279; Shriver v. Sioux City, etc., R. Co., 24 Minn. 506; Smith v. New York, etc., R. Co., 43 Barb. 225; Memphis, etc., R. Co. v. Holloway, 9 Baxt. (Tenn.) 188; Georgia, etc., R. Co. v. Forrester, 96 Ga. 428, 23 S. E. R. 416; Columbus, etc., R. Co. v. Tillman, 79 Ga. 607; Beard & Sons

v. Illinois Cent. R. Co., 79 Iowa 518, s. c. 44 N. W. R. 800, 18 Am. St. R. 381, 7 L. R. A. 280; Laughlin v. Chicago, etc., R. Co., 28 Wis. 204; note to Wells v. Thomas, 27 Mo. 17, 72 Am. Dec. 228, 243. But see Marquette, etc., R. Co. v. Kirkwood, 45 Mich. 51, s. c. 40 Am. R. 453; Darling v. Boston, etc., R. Co., 11 Allen (Mass.) 295. And this rule is not changed by the fact that the last carrier transports them over its line in the foreign car in which it received them. Leo v. St. Paul, etc., R. Co., 30 Minn. 438, s. c. 15 N. W. R. 872, 12 Am. & Eng. R. Cas. 35; Faison v. Alabama, etc., R. Co., 69 Miss. 569, s. c. 13 So. R. 37; Forrester v. Georgia, etc., R. Co., 92 Ga. 699, s. c. 19 S. E. R. 811. The presumption that the connecting carrier received the goods in the same condition in which they started has also been held to apply to an intermediate carrier sued for their loss or injury to them where it did not show that it delivered them to the last carrier in the same condition in which it received them.



has also been intimated that, in the absence of any evidence upon the subject, they will be presumed to have been delivered to the first carrier in good order, and that this presumption prevails as against each succeeding carrier, but we think this doctrine is unsound, for there is nothing upon which to base such a presumption; the owner has at least equal means of knowing the condition of the goods when delivered to the first carrier, and if they are in bad order when delivered by the last carrier, the same reason for presuming that they were originally in that condition may exist as for presuming that when started in good order they remained in that condition until after they were received by the last carrier.<sup>1</sup> Thus, where barrels of molasses were shipped and transported to their destination in a sealed car, and there was no evidence as to the number of barrels or their condition at the time the car was sealed by the first carrier, it was held that the last carrier was entitled to the benefit of the presumption that the number of barrels was the same and their contents in the same condition when they were taken out and delivered by it as when the car was first sealed, and that it was not liable as for failure to safely carry and deliver one barrel of molasses, where it appeared that the barrel was empty and dry when the car was opened by it at the point of destination.<sup>2</sup> Where there was evidence that the weather was very cold before the second carrier received apples which it delivered in a frozen condition, and no evidence that they were delivered to it before they were

Savannah, etc., R. Co. v. Harris, 26 Fla. 148, s. c. 7 So. R. 544, 23 Am. St. R. 551. See, also, Montgomery, etc., R. Co. v. Culver, 75 Ala. 587, s. c. 51 Am. R. 483 (applying the rule in favor of the intermediate carrier); and Louisville, etc., R. Co. v. Jones, 100 Ala. 263, s. c. 14 So. R. 114 (applying rule in favor of initial carrier and distinguishing Georgia, etc., R. Co. v. Hughart, 90 Ala. 36, s. c. 8 So. R. 62, where it was held that if goods are lost and not delivered at all to the consignee, the presumption is against the first carrier).

<sup>1</sup> Missouri Pac. R. Co. v. Breeding, 4 Tex. App. (Civil Cas.) 217, s. c. 16 S. W. R. 184; Gulf, etc., R. Co. v. Holder (Tex.), 30 S.W.R. 383; Evans v. Atlanta, etc., R. Co., 56 Ga. 498; Goodman v. Oregon, etc., R. Co., 22 Ore. 14, s. c. 28 Pac. R. 894, 49 Am. & Eng. R. Cas. 87, 97; Lake Erie, etc., R. Co. v. Oakes, 11 Ill. App. 489.

<sup>2</sup> Cooper v. Georgia, etc., R. Co., 92 Ala. 329, s. c. 9 So. R. 159.

frozen, it was held that it was not liable,<sup>1</sup> and a similar decision was rendered where it appeared that the goods must have been wet and damaged while in the hands of a preceding carrier.<sup>2</sup> So, where a theater drop-curtain, shipped over several connecting lines, was injured by water, it was held that the defendant might show that it did not rain while the curtain was in transit over its line.<sup>3</sup> As may be seen by an examination of the authorities already cited, the presumption which is usually indulged against the last carrier may not arise under the facts of the particular case, and even if it does arise upon the plaintiff's proof in the first instance, it may be rebutted by proper evidence, either direct or circumstantial, showing that the goods were not received by the defendant in good order, or that they were lost or injured on some other line and not by it. This is true, even where the presumption is strengthened by a receipt, as the latter is *prima facie* rather than conclusive evidence, and is equally open to contradiction or explanation.<sup>4</sup>

§ 1451. **Rights and liabilities as to charges.**—As a general rule, where goods are delivered to a carrier for shipment to a destination beyond its line, whether the freight is prepaid or not, succeeding carriers who receive the goods in good faith in the ordinary and usual course of business between connecting carriers and without notice of any special directions by the consignor or limitation upon the apparent authority of the first carrier, are not bound by any secret contract between the consignor and the first carrier for reduced freight or for shipment

<sup>1</sup> *Swetland v. Boston, etc., R. Co.*, 102 Mass. 276.

<sup>2</sup> *Carson v. Harris*, 4 Greene (Iowa) 516.

<sup>3</sup> *Burwell v. Raleigh, etc., R. Co.*, 94 N. Car. 451, s. c. 25 Am. & Eng. R. Cas. 410.

<sup>4</sup> *Burwell v. Raleigh, etc., R. Co.*, 94 N. Car. 451, s. c. 25 Am. & Eng. R. Cas. 410; *Illinois Cent. R. Co. v. Cowles*, 32 Ill. 116; *Gulf, etc., R. Co. v. Holder*, (Tex.) 30 S. W. R. 383; *Hunt v. Michigan, etc., R. Co.*,

37 N. Y. 162 (receipt by connecting carrier insufficient to relieve initial carrier). See, generally, as to evidence to rebut the presumption, *Vicksburg, etc., R. Co. v. Stocking*, (Miss.) s. c. 13 So. R. 469; *Columbus, etc., R. Co. v. Tillman*, 79 Ga. 607, s. c. 5 S. E. R. 135; *Goodman v. Oregon, etc., Co.*, 22 Ore. 14, s. c. 49 Am. & Eng. R. Cas. 87, and compare *Gulf, etc., R. Co. v. Edloff*, (Tex.) 34 S. W. R. 410, affirmed in 34 S. W. R. 414.

over a certain route, but are entitled to reasonable charges for their services and to a lien for their own charges and for freight rightfully paid by them to prior connecting carriers upon the route.<sup>1</sup> So, where a shipper is present and makes no objection when the connecting carrier receives the goods from the preceding carrier and pays the charges thereon, he can not set off a claim for injury to the goods by the first carrier against the claim of the connecting carrier for charges, notwithstanding the connecting carrier knew that the goods had been injured and that the shipper intended to demand compensation from such preceding carrier.<sup>2</sup> And it has been held that although the first carrier gives a bill of lading which states a certain sum as the full rate, if the shipper, upon demand of the connecting carrier when the goods arrive at their destination, pays an additional sum, he can not recover it back from the latter.<sup>3</sup> The theory upon which the connecting carrier is held not to be bound by special instructions or agreements between the shipper and the first carrier is that the shipper

<sup>1</sup> *Potts v. New York, etc., R. Co.*, 131 Mass. 455, s. c. 41 Am. R. 247; *Briggs v. Boston, etc., R. Co.*, 6 Allen (Mass.) 246, s. c. 83 Am. Dec. 626; *Price v. Denver, etc., R. Co.*, 12 Colo. 402, s. c. 21 Pac. R. 188, 37 Am. & Eng. R. Co., 626; *Moses v. Port Townsend, etc., R. Co.*, 5 Wash. 595, s. c. 32 Pac. R. 488; *Moore v. Henry*, 18 Mo. App. 35; *Knight v. Providence, etc., R. Co.*, 13 R. I. 572, s. c. 43 Am. R. 46; *Vaughan v. Providence, etc. R. Co.*, 13 R. I. 578; *Schneider v. Evans*, 25 Wis. 241, s. c. 3 Am. R. 56; *Patten v. Union Pac. R. Co.*, 29 Fed. R. 590; *Loewenberg v. Railway Co.*, 56 Ark. 439, s. c. 19 S. W. R. 1051; *Georgia, etc., R. Co. v. Murrah*, 85 Ga. 343, s. c. 11 S. E. R. 779, 45 Am. & Eng. R. Cas. 334; *Sumner v. Southern R. Assn.*, 7 Baxt. (Tenn.) 345, s. c. 9 Am. & Eng. R. Cas. 18; *Missouri, etc., R. Co. v. Stoner*, 5 Tex. Civ. App. 50; *Wells v. Thomas*, 27 Mo. 17, s. c. 72 Am. Dec.

228, and note. But see *Fitch v. Newberry*, 1 Doug. (Mich.) 1, s. c. 40 Am. Dec. 33, and *Marsh v. Union Pac. R. Co.*, 3 McCrary (U. S. C. C.) 236, both of which are disapproved in *Crossan v. New York, etc., R. Co.*, 149 Mass. 196, s. c. 21 N. E. R. 367. In *Illinois Cent. R. Co. v. Brookhaven, etc., Co.*, 71 Miss. 663, s. c. 16 So. R. 252, it is held that this rule does not apply as to charges of a prior carrier which are in excess of the amount fixed by its special contract and which the connecting carrier is seeking to collect but has not paid.

<sup>2</sup> *St. Louis, etc., R. Co. v. Lear*, 54 Ark. 399, s. c. 55 Am. & Eng. R. Cas. 414. See, also, *Knight v. Providence, etc., R. Co.*, 13 R. I. 572, s. c. 9 Am. & Eng. R. Cas. 80; *Bissel v. Price*, 16 Ill. 408; *Bowman v. Hilton*, 11 Ohio 303.

<sup>3</sup> *Mount Pleasant, etc., Co. v. Cape Fear, etc., R. Co.*, 106 N. Car. 207, s. c. 42 Am. & Eng. R. Cas. 498.

makes the initial carrier his own forwarding agent and should look to it for redress rather than to an independent connecting carrier, which, as it is usually bound to receive and carry goods properly delivered to it in the customary manner, is also entitled to its usual charges and the charges of prior connecting carriers advanced by it in the usual course of business. But if the connecting carrier has notice that the initial carrier has fraudulently diverted the goods from the line specifically designated to that of the connecting carrier and the latter becomes a party to the fraud for the purpose of getting the advantage of the rival line over which the contract provided that the goods should be shipped, it is not entitled to a lien either for charges for its own services or for those advanced by it to the first carrier.<sup>1</sup> So, generally, if the possession of the property is not obtained in good faith in the usual course of business, but is wrongful and illegal, the carrier is not entitled to a lien thereon either for its own charges or for those advanced to the prior carrier.<sup>2</sup> And if a partnership exists between the carriers, or if the connecting carrier holds the initial carrier out to the world as its agent with apparent authority to bind it in such matters it may lose the right which it might otherwise have to a lien for charges in excess of those fixed in the contract with the initial company or payment of charges advanced by it.<sup>3</sup> So, as against innocent third persons who have taken a bill of lading for value upon the faith of the representations therein that the freight charges were all prepaid, the connecting carrier may not be entitled to enforce a lien for its own charges or for those paid by it to the prior carrier thereafter, particularly

<sup>1</sup> *Denver, etc., R. Co. v. Hill*, 13 Colo. 35, s. c. 40 Am. & Eng. R. Cas. 145, 4 L. R. A. 376; *Bird v. Georgia R. Co.*, 72 Ga. 655, s. c. 27 Am. & Eng. R. Cas. 39.

<sup>2</sup> *Robinson v. Baker*, 5 Cush. (Mass.) 137; *Stevens v. Boston, etc., R. Co.*, 8 Gray (Mass.) 262; *Andrews v. Dietrich*, 14 Wend. (N. Y.) 31; *Fitch v. Newberry*, 1 Doug. (Mich.) 1, s. c. 40 Am. Dec. 33. See, also, *Adams v.*

*O'Connor*, 100 Mass. 515; *Bissel v. Price*, 16 Ill. 408. But compare *Walker v. Cassaway*, 4 La. Ann. 19, s. c. 50 Am. Dec. 551.

<sup>3</sup> See *Evansville, etc., R. Co. v. Marsh*, 57 Ind. 505; *Harp v. The Grand Era*, 1 Woods (U. S. C. C.) 184; *Knight v. Providence, etc., R. Co.*, 13 R. I. 572, s. c. 9 Am. & Eng. R. Cas. 90; *Norfolk, etc., R. Co. v. Read*, 87 Va. 185, s. c. 12 S. E. R. 395.

where it has notice or information sufficient to put it upon inquiry as to the negotiation and ownership of the bill of lading.<sup>1</sup> It has been held that a connecting carrier is under no obligation to pay accrued charges upon freight tendered to it by a preceding carrier,<sup>2</sup> and that it has no right to detain freight received by it from another carrier until it has received a bill of back charges;<sup>3</sup> but it has also been held, on the other hand, that when several independent carriers successively receive goods for transportation each is entitled to payment of the charges in advance or to a lien on the goods for the same,<sup>4</sup> and that if the initial carrier neglects to inform the succeeding carrier of the payment of the freight charges the latter may detain the goods for a reasonable time in which to ascertain the facts.<sup>5</sup>

**§ 1452. Liability of carriers as between themselves—Action over.**—It is said that “the common law obligation of a railroad company to a connecting line are the same as to reception, transportation and delivery of freight as those existing between a railroad company and an individual shipper.”<sup>6</sup> This statement, in its unlimited and unqualified form, is, perhaps, too broad, but it is true in the main. Thus, it has been held that the one carrier has no more right to require another carrier to stop its trains and deliver and receive passengers and freight at the junction of the two roads where the former has established a station only half a mile from a station already established on the other road than an individual would have to re-

<sup>1</sup> *American Nat. Bank v. Georgia R. Co.*, 96 Ga. 665, s. c. 23 S. E. R. 898.

<sup>2</sup> *Baltimore, etc., R. Co. v. Adams Ex. Co.*, 22 Fed. R. 32; *Oregon, etc., R. Co. v. Northern Pac. R. Co.*, 51 Fed. R. 465.

<sup>3</sup> *Dunham v. Boston, etc., R. Co.*, 70 Me. 164, s. c. 35 Am. R. 314; *Michaels v. New York, etc., R. Co.*, 30 N. Y. 564; *Root v. Great Western R. Co.*, 45 N. Y. 524. But see *Judson v. Western R. Co.*, 4 Allen (Mass.) 520; *Living-*

*ston v. New York, etc., R. Co.*, 76 N. Y. 631.

<sup>4</sup> *Knight v. Providence, etc., R. Co.*, 13 R. I. 572, s. c. 9 Am. & Eng. R. Cas. 90. See, also, *Randall v. Richmond, etc., R. Co.*, 108 N. Car. 612, s. c. 13 S. E. R. 137, and compare *Grand Rapids, etc., R. Co. v. Diether*, 10 Ind. App. 206, s. c. 37 N. E. R. 39, 1069.

<sup>5</sup> *Union Ex. Co. v. Shoop*, 85 Pa. St. 325.

<sup>6</sup> *Ray on Freight Carriers*, 390.

quire the trains of a carrier to stop at the point nearest his house and most convenient to him.<sup>1</sup> So, the initial carrier stands as to the succeeding carrier, in most respects as the owner of the goods and usually has authority to contract with the succeeding carrier on behalf of the owner.<sup>2</sup> But usage or custom may often exert an important influence upon the relative rights, duties and liabilities of the different carriers as among themselves, particularly in regard to delivering and receiving goods, which, if unknown to the shipper and not such as he ought to take notice of, would not affect the rights of the shipper.<sup>3</sup> So, carriers may sometimes be held liable to a shipper as partners when, as between themselves, they are not partners and private arrangements between themselves may bind them without in any way binding the shipper or affecting their duties and liability to him.<sup>4</sup> The shipper may usually sue either an initial carrier which undertakes to transport goods over connecting lines without limiting its liability to its own line or the carrier which is guilty of the default or commits the injury, but, as between the carriers, the general rule is that each one is liable for the result of its own negligence or breach of duty, and, although the first carrier may have assumed the responsibility for the transportation of the goods beyond its own line, and damages may be recovered against it by the shipper for a failure in that regard, yet the carrier which actually causes the injury will be liable to it for such damages.<sup>5</sup> If the carrier which caused the injury is duly

<sup>1</sup>Shelbyville, etc., R. Co. v. Louisville, etc., R. Co., 82 Ky. 541, s. c. 21 Am. & Eng. R. Cas. 233. See, also, Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co. 37 Fed. R. 567, s. c. 2 L. R. A. 289.

<sup>2</sup>Ray on Freight Carriers, 391, 392; Squire v. New York, etc., R. Co., 98 Mass. 239, s. c. 93 Am. Dec. 162; Rawson v. Holland, 59 N. Y. 611, s. c. 17 Am. R. 394; Marquette, etc., R. Co. v. Kirkwood, 45 Mich. 51, s. c. 40 Am. R. 453; York Co. v. Cent. R. Co., 3 Wall. (U. S.) 113.

<sup>3</sup>Wallace v. Rosenthal, 40 Ga. 419; Conkey v. Milwaukee, etc., R. Co., 31 Wis. 619, s. c. 11 Am. R. 630; Condon v. Marquette, etc., R. Co., 55 Mich. 218, s. c. 54 Am. R. 367; McDonald v. Western, etc., R. Co., 34 N. Y. 497. See *ante*, § 1444, and notes.

<sup>4</sup>*Ante*, § 1446.

<sup>5</sup>Missouri Pac. R. Co. v. Twiss, 35 Neb. 267, s. c. 53 N. W. R. 76; Chicago, etc., R. Co. v. Northern, etc., Co., 70 Ill. 217; Vermont, etc., R. Co. v. Fitchburg R. Co., 14 Allen (Mass.) 462; Conkey v. Milwaukee, etc., R.

notified to come in and defend the action against the initial carrier, or, it seems, even if it is not expressly notified to defend, if it knows that it alone caused the injury and is liable over and is aware of the pendency of the suit and its right to defend, the judgment against the initial carrier therein will be conclusive against such connecting carrier as to the amount of the damages in an action against it by the initial carrier.<sup>1</sup> A contract between a shipper and an initial carrier whereby such carrier agrees to transport goods over its own line and deliver them to a designated independent connecting carrier for transportation to their destination may incidentally be of advantage to the connecting carrier, but it is not a contract for the benefit of the connecting carrier in such a sense as to give the latter a right of action against the initial carrier for violating the contract by delivering the goods to another connecting carrier for transportation to their destination.<sup>2</sup>

Co., 31 Wis. 619. But see *New York, etc., R. Co. v. National, etc., Co.*, 137 N. Y. 23, s. c. 32 N. E. R. 993. As to when the statute of limitations begins to run against such an action, see *Pennsylvania Co. v. Chicago, etc., R. Co.*, 144 Ill. 197, s. c. 55 Am. & Eng. R. Cas. 424, 33 N. E. R. 415.

<sup>1</sup>*Missouri Pac. R. Co. v. Twiss*, 35 Neb. 267, s. c. 53 N. W. R. 76. See,

also, *Elliott on Roads and Streets*, 656, 657. But compare *Baxendale v. London, etc., R. Co.*, 44 L. J. Ex. 20, s. c. L. R. 10 Ex. 35. The judgment is not, of course, conclusive as to the liability of the second company to the first. *Chicago, etc., R. Co. v. Northern, etc., Co.*, 70 Ill. 217.

<sup>2</sup>*St. Louis, etc., R. Co. v. Missouri Pac. R. Co.*, 35 Mo. App. 272.

## CHAPTER LX.

### COMMON LAW DUTIES OF COMMON CARRIERS.

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§ 1453. Who are railroad carriers—Fast freight lines—Union depot companies—Express companies.—Under the term railroad carriers we include all persons and corporations that undertake to carry goods over lines of railways. As elsewhere appears, express companies, fast freight companies, despatch companies, and other organizations of a similar character, are regarded by us as railroad carriers.<sup>1</sup> We have availed ourselves of the privilege which John Stuart Mill says authors possess, of giving our definitions and employing the terms as we have defined them. A fast freight or despatch company is not in the strict sense a railroad carrier, but the courts have treated such companies as railroad carriers and held them subject to the duties and liabilities of railroad carriers. These companies often make contracts with the railroad companies, and the latter have endeavored by that means to escape liability in their capacity of common carriers but the courts have steadfastly refused to permit them to avoid liability by any such means.<sup>2</sup> The law will not permit railroad carriers to escape their duties

<sup>1</sup> *Ante*, § 140.

<sup>2</sup> In the case of *The Bank of Kentucky v. Adams, etc., Co.*, 93 U. S. 174, it was said: "Over very many of our railroads the contracts for transportation of goods are made, not with the owners of the roads, nor with the railroad companies themselves, but with transportation agencies or companies which have arrangements with the railroad companies for the carriage. In this manner, some of the responsibilities of common carriage

are often sought to be evaded; but in vain. Public policy demands that the right of the owners to absolute security against the negligence of the carrier and of all persons engaged in performing the carrier's duty, shall not be taken away by any reservation in the carrier's receipt, or by any arrangement between him and the performing company." See, generally, *Insurance Co. v. Railroad Co.*, 104 U. S. 146; *Shearer v. Pacific, etc., Co.*, 43 Ill. App. 641.

as common carriers by assuming the title of "forwarders" or the like, or by employing any similar means. The court will look through form to substance and hold them to a due performance of their duties as common carriers.<sup>1</sup> Union depot companies may, under some circumstances, be common carriers.<sup>2</sup> If they undertake any part of the duty of carrying the goods as independent carriers or connecting carriers we suppose that they would be held liable as common carriers.<sup>3</sup> Where, however, a union depot company is formed of several railroad companies and simply maintains a depot for the receipt and discharge of goods we do not think it could be considered a common carrier, but so much depends upon the statute governing the particular case and upon the facts of such case that it is unsafe to attempt to lay down a general rule. The employes of a union depot company may be, in a restricted sense, the agents of each of the several companies forming the union company. Thus, where the ticket-seller of the union company has authority to sell tickets for all the constituent companies the request for a ticket over the line of one of such companies calls upon the ticket-seller to act as the agent of the company over whose line the passenger desires to travel.<sup>4</sup> In a case where two railroad companies used one de-

<sup>1</sup> *Christenson v. American, etc., Co.*, 15 Minn. 270, s. c. 2 Am. R. 122; *Buckland v. Adams Ex. Co.*, 97 Mass. 124, s. c. 33 Am. Dec. 68; *United States, etc., Co. v. Backman*, 28 Ohio St. 144; *Oderkirk v. Fargo*, 58 Hun 347; *Read v. Spaulding*, 5 Bosw. 395; *Merchants', etc., Co. v. Joesting*, 89 Ill. 152; *Southern, etc., Co. v. McVeigh*, 20 Gratt. 264. See, generally, *Wells v. American, etc., Co.*, 55 Wis. 23, s. c. 42 Am. R. 695; *Galt v. Adams Ex. Co.*, *McArth. & M. (U. S. C. C.)* 124, 48 Am. R. 742; *Southern, etc., Co. v. Glenn*, 16 Lea 472; *Bardwell v. American, etc., Co.*, 35 Minn. 344; *Hadd v. United States, etc., Co.*, 52 Vt. 335, 36 Am. R. 757.

<sup>2</sup> As bearing upon the organization,

rights, powers and duties of union depot companies, see *St. Paul Union Depot Co. v. Minnesota, etc., R. Co.*, 47 Minn. 154, s. c. 13 L. R. A. 415; *King v. Barnes*, 109 N. Y. 267; *State v. St. Paul, etc., R. Co.*, 42 Minn. 142, s. c. 6 L. R. A. 234; *People v. Cheeseman*, 7 Colo. 376, s. c. 16 Am. & Eng. R. Cas. 400; *Mayor of Worcester v. Norwich, etc., R. Co.*, 109 Mass. 103; *Fort St., etc., Co. v. Morton*, 83 Mich. 265; *Union Depot, etc., Co. v. Chicago, etc., Co.*, 113 Mo. 213, s. c. 56 Am. & Eng. R. Cas. 245; *Challiss v. Atchison, etc., R. Co.*, 45 Kan. 398.

<sup>3</sup> *Pennsylvania Co. v. Ellett*, 132 Ill. 654.

<sup>4</sup> *Scott v. Cleveland, etc., R. Co.*, (Ind.) 43 N. E. R. 133.

pot, but only one of them used it in the night time, it was held that there was no liability on the part of the company not using the depot in the night time for the injury due to a failure to light the depot,<sup>1</sup> and upon the reasoning of the opinion in that case it would seem to follow that each of the several companies and not the union company would be liable for its torts. But there may, of course, be torts committed by the employes of the union company acting for that company and not for any one of the constituent companies, and in such a case the union company, if the constituent companies were not partners or otherwise jointly bound, would alone be liable.<sup>2</sup> Express companies derive their rights from the railroad companies upon whose lines they do business and an express company can not stipulate that it shall not be liable for the negligence of the company<sup>3</sup> from which the rights are acquired. As we have elsewhere said, the common law forbidding discrimination does not inhibit a railroad company from giving the right to do business over its road to one express company to the exclusion of others.<sup>4</sup>

§ 1454. General nature of the common law duty.—As we have elsewhere said railroad carriers are invested with rights of a public nature,<sup>5</sup> and are charged with duties of a public

<sup>1</sup> Louisville, etc., R. Co. v. Treadway, 142 Ind. 475.

<sup>2</sup> Indianapolis, etc., R. Co. v. Cooper, 6 Ind. App. 202, s. c. 33 N. E. R. 219.

<sup>3</sup> Bank of Kentucky v. Adams, etc., Co., 93 U. S. 174. See Packard v. Taylor, 35 Ark. 402, s. c. 37 Am. R. 37; Boscowitz v. Adams, etc., Co., 93 Ill. 523; Adams, etc., Co. v. Jackson, 92 Tenn. 326, s. c. 21 S. W. 666, 55 Am. & Eng. R. Cas. 319.

<sup>4</sup> Ante, § 1453; Memphis, etc., R. Co. v. Southern, etc., R. Co., 117 U. S. 1, 6 Sup. Ct. R. 542, 23 Am. & Eng. R. Cas. 545; United States v. Delaware, etc., R. Co., 40 Fed. R. 101; Little Rock, etc., R. Co. v. East Tennessee, etc., R. Co., 47 Fed. R. 771; Ilwaco, etc., R. Co. v. Oregon, etc., Co., 57 Fed. R. 673; Delaware, etc., Co. v. Central,

etc., Co., 43 N. J. Eq. 77; Pfister v. Central, etc., R. Co., 70 Cal. 169, 11 Pac. R. 686. See, generally, as to the doctrine of unjust discrimination as applied to express companies. International, etc., Co. v. Grand Trunk, etc., R. Co., 81 Me. 92, s. c. 16 Atl. R. 370, 37 Am. & Eng. R. Cas. 622; Alsop v. Southern, etc., Co., 104 N. Car. 278, s. c. 10 S. E. R. 297, 6 L. R. A. 271, 41 Albany L. J. 167; Sargent v. Boston, etc., R. Co., 115 Mass. 416; The D. R. Martin, 11 Blatchf. 233.

<sup>5</sup> Ante, § 1393. As to the rule that railroad companies are common carriers, see St. Joseph, etc., R. Co. v. Palmer, 38 Neb. 463, s. c. 22 L. R. A. 335; Atchison, etc., R. Co. v. Washburn, 5 Neb. 117.

character. As we have heretofore shown, and as we shall hereafter more fully show, they are, in their capacity of common carriers, subjected to governmental control and regulation because of the public nature of their rights and duties. They are, however, regulated and controlled both by statute and by the rules of the common law. Statutes in many of the states have limited the rights, enlarged the duties and increased the liabilities of railroad carriers and so has the statute of the United States generally known as the "Interstate Commerce Law," but it is our purpose in this chapter to treat of the common law rules and not of those prescribed by statutes, state or national. The common law imposes very onerous duties upon carriers and holds them to very strict accountability. These rules prevail except where they have been changed or abrogated by statute. By the common law carriers are bailees for hire but their liability is much greater than those of ordinary bailees for hire or reward. The liability of common carriers is an extraordinary one, and does not depend upon the question of negligence or no negligence, for they may be liable for the loss of goods or for injury to them, although there has been, on their part, no negligence. They are in effect insurers of the goods entrusted to them for transportation,<sup>1</sup> and according to the old common law rule can escape liability only upon some one of the following grounds, namely, that the loss or injury was caused by the act of God, or by the act of the

<sup>1</sup> *McCarthy v. Louisville, etc., R. Co.*, 102 Ala. 193, s. c. 48 Am. St. R. 29; *Alabama, etc., R. Co. v. Thomas*, 89 Ala. 294, s. c. 7 So. R. 762; *Louisville, etc., R. Co. v. Nicholai*, 4 Ind. App. 119, s. c. 30 N. E. R. 424; *McKinney v. Jewett*, 90 N. Y. 267, s. c. 9 Am. & Eng. R. Cas. 209; *Packard v. Taylor*, 35 Ark. 402, s. c. 37 Am. R. 37; *Chicago, etc., R. Co. v. Shea*, 66 Ill. 471; *Hall v. Renfro*, 3 Mecl. (Ky.) 51; *Bohannon v. Hammond*, 42 Cal. 227; *Robertson v. Kennedy*, 2 Dana 430; *Fillebrown v. Grand Trunk R. Co.*, 55 Me. 462; *Davis v. Wabash, etc., R. Co.*, 89 Mo. 340, s. c. 1 S. W. R. 327, 26 Am. & Eng. R. Cas. 315; *Watson v. Memphis, etc., R. Co.*, 9 Heisk. 255; *Culbreth v. Philadelphia, etc., R. Co.*, 3 Houst. (Del.) 392; *Railway Co. v. Cravens*, 57 Ark. 112, s. c. 20 S. W. R. 803, 7 Am. R. & Corp. R. (Lewis) 270, and authorities cited note p. 281; *Willock v. Pennsylvania R. Co.*, 166 Pa. St. 184, s. c. 45 Am. St. R. 674; *Lewis v. Ludwick*, 6 Colo. 368, s. c. 98 Am. Dec. 454; *Richmond, etc., R. Co. v. Benson*, 86 Ga. 203, s. c. 22 Am. St. R. 446.

public enemy. The modern rule is more liberal, for, to the old common law grounds which will exonerate the carrier from liability have been added the following, namely, acts of the public authorities, and loss or injury attributable to the inherent nature of the goods. It is sometimes said that another ground has been added by the modern law, namely that arising from the acts of the shipper, but we think there never was a time when the carrier could be held liable where the loss was caused by the wrong or fault of the shipper. The duties of common carriers as such do not rest upon contract but are imposed by law.<sup>1</sup> As the duties of common carriers are imposed by law they are not at liberty to arbitrarily refuse to carry,<sup>2</sup> nor to make unjust discriminations nor have they a right to impose such limitations as they choose. But while there is no general right to impose limitations there is according to the great weight of authority, a right within reasonable bounds to impose limitations.<sup>3</sup>

<sup>1</sup> *Merritt v. Earle*, 29 N. Y. 115; *Carroll v. Staten Island, etc., R. Co.*, 65 Barb. 32; *Thurman v. Wells*, 18 Barb. 500.

<sup>2</sup> *Hollister v. Nowlen*, 19 Wend. 234; *Merchants', etc., Co. v. Cornforth*, 3 Colo. 280; *York Co. v. Central R. Co.*, 3 Wall. 107; *New Jersey, etc., R. Co. v. Merchants' Bank*, 6 How. (U. S.) 344; *St. Louis, etc., R. Co. v. Weakly*, 50 Ark. 397; *Western, etc., Co. v. Newhall*, 24 Ill. 466; *Kansas Pac. R. Co. v. Reynolds*, 17 Kan. 251; *Levering v. Union, etc., Co.*, 42 Mo. 88; *Michigan, etc., R. Co. v. Hale*, 6 Mich. 243; *Dorr v. New Jersey, etc., Co.*, 11 N. Y. 485; *Schofield v. Railway Co.*, 43 Ohio St. 571; *Nelson v. Hudson River R. Co.*, 48 N. Y. 498; *Kirkland v. Dinsmore*, 62 N. Y. 271; *Atchison, etc., R. Co. v. Dill*, 48 Kan. 210, s. c. 29 Pac. R. 148.

<sup>3</sup> This question is elsewhere discussed and we simply allude to the subject at this place. See *Hart v.*

*Pennsylvania Co.*, 112 U. S. 331, s. c. 5 Sup. Ct. R. 151, citing and approving, *Newburger v. Howard*, 6 Phila. 174; *Squire v. New York, etc., R. Co.*, 98 Mass. 239; *Hopkins v. Westcott*, 6 Blatchf. 64; *Belger v. Dinsmore*, 51 N. Y. 166; *Oppenheimer v. United States, etc., Co.*, 69 Ill. 62; *Magnin v. Dinsmore*, 56 N. Y. 168; *Ernest v. Express Co.*, 1 Woods 573; *Elkins v. Empire, etc., Co.*, 81½ Pa. St. 315; *South, etc., R. Co. v. Henlein*, 52 Ala. 606; *Muser v. Holland*, 17 Blatchf. 412; *Harvey v. Terre Haute, etc., R. Co.*, 74 Mo. 538; *Graves v. Lake Shore, etc., R. Co.*, 137 Mass. 33. *Disapproving Southern, etc., R. Co. v. Moon*, 39 Miss. 822; *United States, etc., R. Co. v. Backman*, 28 Ohio St. 144; *Black v. Goodrich, etc., Co.*, 55 Wis. 319, s. c. 13 N. W. R. 244; *Chicago, etc., R. Co. v. Abels*, 60 Miss. 1017; *Kansas City, etc., R. Co. v. Simpson*, 30 Kan. 645, s. c. 2 Pac. R. 821; *Moulton v. St. Paul, etc., R. Co.*,

§ 1455. **Act of God—What constitutes.**—As we have seen, the common law holds the common carrier exonerated in cases where the act of God is the proximate cause of the loss of goods entrusted to it for transportation. There is no diversity of opinion as to the rule that the act of God does exonerate the carrier,<sup>1</sup> but there is conflict of opinion as to what may be considered as the act of God. It may safely be said, however, that if there is any intervening human agency which contributes to the production of the loss, the loss can not be considered as caused by the act of God in such a sense as to relieve the carrier from liability.<sup>2</sup> There may be accidents causing loss without fault

31 Minn. 85, s. c. 16 N. W. R. 497. See, also, upon the general subject, *Maxwell v. Southern, etc., Co.*, (La.) 19 So. R. 287; *Smith v. American, etc., Co.*, (Mich.) 66 N. W. R. 479; *Baltimore, etc., R. Co. v. Ragsdale*, (Ind. App.) 42 N. E. R. 1106.

<sup>1</sup> *Riley v. Horne*, 5 Bing. 217, s. c. 15 E. C. L. 549; *Fenwick v. Schmalz*, L. R. 3 C. P. 313; *The Maggie Hammond*, 9 Wall. 435; *Gleeson v. Virginia, etc., R. Co.*, 5 Mackey (D. C.) 356; *Strouss v. Wabash, etc., R. Co.*, 17 Fed. R. 209; *Pendall v. Rench*, 4 McLean 259; *Smith v. Western, etc., R. Co.*, 91 Ala. 455, s. c. 24 Am. St. R. 929; *Hooper v. Wells*, 27 Cal. 11, s. c. 85 Am. Dec. 211; *Converse v. Brainerd*, 27 Conn. 607; *Richmond, etc., R. Co. v. White*, 88 Ga. 805; *Emery v. Hersey*, 4 Me. 407, s. c. 16 Am. Dec. 268; *Hastings v. Pepper*, 11 Pick. 41; *Fergusson v. Brent*, 12 Md. 9, s. c. 71 Am. Dec. 582; *Ballentine v. North Missouri R. Co.*, 40 Mo. 491, s. c. 93 Am. Dec. 315; *Neal v. Saunderson*, 2 Smed. & M. (Miss.) 572, s. c. 41 Am. Dec. 609; *Cobb v. McMechen*, 6 Johns. 160, s. c. 5 Am. Dec. 200; *Michaels v. New York, etc., R. Co.*, 30 N. Y. 564, s. c. 86 Am. Dec. 415; *Black v. Chicago, etc. R. Co.*, 30 Neb. 197; *Moses v. Norris*, 4 N. H. 304; *New Brunswick, etc., Co. v. Tiers*, 24

N. J. Law 697, s. c. 64 Am. Dec. 396; *Livezey v. Philadelphia*, 64 Pa. St. 106, s. c. 3 Am. R. 578; *Philadelphia, etc., R. Co. v. Anderson*, 94 Pa. St. 351, s. c. 39 Am. R. 787; *Slater v. South Carolina R. Co.*, 29 S. Car. 96; *McClures v. Hammond*, 1 Bay (S. Car.) 99, s. c. 1 Am. Dec. 598; *Merchants', etc., Co. v. Bloch*, 86 Tenn. 392, s. c. 6 Am. St. R. 847; *Murphy v. Staton*, 3 Munf. (Va.) 239; *Strohn v. Detroit, etc., R. Co.*, 23 Wis. 126 s. c. 99 Am. Dec. 114; *Day v. Ridley*, 16 Vt. 48, s. c. 42 Am. Dec. 489; *McGraw v. Baltimore, etc., R. Co.*, 18 W. Va. 361, s. c. 41 Am. R. 696.

<sup>2</sup> *Friend v. Woods*, 6 Gratt. 189, s. c. 52 Am. Dec. 119; *New Brunswick, etc., Co. v. Tiers*, 24 N. J. Law 697, s. c. 64 Am. Dec. 396; *McArthur v. Sears*, 21 Wend. 190; *Read v. Spaulding*, 30 N. Y. 630, s. c. 86 Am. Dec. 426; *Propeller Niagara v. Cordes*, 21 How. 7; *Proprietors of Trent Navigation v. Wood*, 3 Esp. 127; *Nugent v. Smith*, L. R. 1 C. P. Div. 423; *Oakley v. Portsmouth, etc., Co.*, 11 Exch. 618; *Hill v. Sturgeon*, 28 Mo. 323. See, generally, *Strouss v. Wabash, etc., R. Co.*, 17 Fed. R. 209; *Gosling v. Higgins*, 1 Camp. 451; *Fairchild v. Slocum*, 19 Wend. 329; *The Maggie Hammond*, 9 Wall. 435; *Graff v. Bloomer*, 9 Pa. St. 114; *Par-*

or negligence on the part of the carriers, and still the carriers will be liable.<sup>1</sup> It is, however, quite well settled that where the loss is caused by extraordinary storms, tempests or the like, the carrier is exonerated unless some fault on its part concurred in producing the result.<sup>2</sup> Thus, in one of the reported cases it was held that the carrier was not liable for loss caused by a sudden and extraordinary wind storm.<sup>3</sup> It has been held that a flood or freshet may be regarded as the act of God, although not unprecedented, if it was extraordinary and unexpected,<sup>4</sup> but we suppose that the carrier is not exonerated simply because the loss was caused by an unexpected flood.<sup>5</sup> An extraordinary and unprecedented flood which causes a delay in transportation, resulting in the loss of perishable property, is such an act of God as will release the carrier from liability.<sup>6</sup> Where the immediate and sole cause of loss is the ac-

ker v. Flagg, 26 Me. 181; Miller v. Steam Navigation Co., 10 N. Y. 431; Hays v. Kennedy, 41 Pa. St. 378; Mershon v. Hobensack, 22 N. J. Law 372; Chevallier v. Straham, 2 Tex. 115-125; Faulkner v. Wright, Rice L. (S. Car.) 107.

<sup>1</sup>Forward v. Pittard, 1 T. R. 27; Hyde v. Trent, etc., Co., 5 T. R. 389; American, etc., Co. v. Moore, 5 Mich. 368; Hibler v. McCartney, 31 Ala. 501.

<sup>2</sup>Nashville, etc., R. Co. v. King, 6 Heisk. 269; Nashville, etc., R. Co. v. David, 6 Heisk. 261, s. c. 19 Am. R. 594; Ballentine v. North Missouri, etc., R. Co., 40 Mo. 491, s. c. 93 Am. Dec. 315; Wallace v. Clayton, 42 Ga. 443; Pearce v. The Thomas Newton, 41 Fed. R. 106; Packard v. Taylor, 35 Ark. 402; Hibernia, etc., Co. v. St. Louis Transportation Co., 120 U. S. 166; Bowman v. Teall, 23 Wend. 306, s. c. 35 Am. Dec. 562; Harris v. Rand, 4 N. H. 259, s. c. 17 Am. Dec. 421; Feinberg v. Delaware, etc., R. Co., 52 N. J. Law 451. Loss caused by an earthquake is attributable to the act of God. Sla-

ter v. South Carolina R. Co., 29 S. Car. 96.

<sup>3</sup>Blythe v. Denver, etc., R. Co., 15 Colo. 333, s. c. 25 Pac. R. 702. In the case cited a car was blown from the track, a stove overturned, the coals thrown from the stove set fire to and consumed the goods, and it was held that the storm was the proximate cause of the loss. The court cited Insurance Co. v. Transportation Co., 12 Wall. 194; Milwaukee, etc., R. Co. v. Kellogg, 94 U. S. 469; Insurance Co. v. Boon, 95 U. S. 117.

<sup>4</sup>People v. Utica, etc., Co., 22 Ill. App. 159; Smyrl v. Niolon, 2 Bailey Law 421, s. c. 23 Am. Dec. 146.

<sup>5</sup>Gleeson v. Virginia, etc., R. Co., 140 U. S. 435, reversing Gleeson v. Virginia, etc., R. Co., 5 Mackey 356. What is to be, or indeed what may be, expected, the carrier must guard against.

<sup>6</sup>Norris v. Savannah, etc., R. Co., 23 Fla. 182, s. c. 11 Am. St. R. 355 (citing Read v. Spaulding, 30 N. Y. 630; Railroad Co. v. Reeves, 10 Wall. 176; Maslin v. Baltimore, etc., R. Co.,

tion of the elements, as by freezing, the carrier is relieved from liability,<sup>1</sup> but if the fault of carrier concurs he is not relieved.<sup>2</sup>

§ 1456. **Act of God—Express contract.**—Where there is an express contract to carry and deliver within a specified time and no limitations or qualifications therein, it is held that the carrier can not make available defenses founded upon causes arising from what is termed the act of God.<sup>3</sup> Where, however, there is no such express contract a different rule prevails and from a loss attributable to causes arising from the act of God the carrier may be exonerated.<sup>4</sup> A railroad carrier may enlarge its liability by contract, but it will not be deemed to have done so unless the provisions of the contract clearly indicate an intention to assume a greater liability than that imposed by law.<sup>5</sup>

§ 1457. **Burden on carrier to prove that act of God caused loss—Concurring negligence.**—The burden is on the carrier

14 W. Va. 180, s. c. 35 Am. R. 748; *Williams v. Grant*, 1 Conn. 487, s. c. 7 Am. Dec. 235; *Hall & Co. v. Renfro*, 3 Metc. (Ky.) 51; 2 Redfield on Ry. 6; *Friend v. Woods*, 6 Gratt. 189, s. c. 52 Am. Dec. 119). See, also, *Railroad Co. v. Reeves*, 10 Wall. 176; *Black v. Chicago, etc., R. Co.*, 30 Neb. 197; *Wallace v. Clayton*, 42 Ga. 443; *Hoadley v. Northern, etc., Co.*, 115 Mass. 304, s. c. 15 Am. R. 106; *Vicksburg, etc., R. Co. v. Ragsdale*, 46 Miss. 458; *American, etc., Co. v. Smith*, 33 Ohio St. 511, s. c. 31 Am. R. 561; *Lipford v. Charlotte, etc., R. Co.*, 7 Rich. Law 409; *Nashville, etc., R. Co. v. David*, 6 Heisk. 261, s. c. 19 Am. R. 594. In the case of *St. Louis, etc., R. Co. v. Bland*, (Tex. Civ. App.) 34 S. W. R. 675, the court held that it was error to instruct that the railroad company in constructing its road should have given heed to the history of previous floods within the memory of living men, as due

care in locating and constructing the road may be shown, although no effort was made to obtain the history of previous floods.

<sup>1</sup> *Crosby v. Fitch*, 12 Conn. 410, s. c. 31 Am. Dec. 745; *Parsons v. Hardy*, 14 Wend. 215, s. c. 28 Am. Dec. 521; *Harris v. Rand*, 4 N. H. 259, s. c. 17 Am. Dec. 421; *Empire, etc., Co. v. Wallace*, 68 Pa. St. 302, s. c. 8 Am. R. 178; *Beckwith v. Frisbie*, 32 Vt. 559.

<sup>2</sup> *Milton v. Denver, etc., R. Co.*, 1 Colo. App. 307.

<sup>3</sup> *Miller v. Chicago, etc., R. Co.*, 1 Mo. App. R. 474. Reference is made in the opinion in the case cited to Angell on Carriers, § 294; *Davis v. Smith*, 15 Mo. 467; *Harrison v. Missouri R. Co.*, 74 Mo. 364; *Harmony v. Burgham*, 12 N. Y. 99.

<sup>4</sup> *Miller v. Chicago, etc., R. Co.*, 1 Mo. App. R. 474.

<sup>5</sup> *Price v. Hartshorn*, 44 Barb. 655, s. c. 44 N. Y. 94; *Gage v. Tirrell*, 9 Allen 299.



who relies on the defense that the loss was caused by the act of God to affirmatively prove that the act of God was the cause of the injury or loss.<sup>1</sup> There is, however, a diversity of opinion upon the question whether the carrier is bound to supplement evidence that the loss was caused by the act of God by evidence that its own negligence or fault did not contribute to the injury. Some of the cases affirm that if the carrier shows that the loss was caused by the act of God he is excused,<sup>2</sup> while other cases hold that he must affirmatively show that there was no negligence or fault on his part.<sup>3</sup> If the fault or

<sup>1</sup> *Wallingford v. Columbia, etc., R. Co.*, 26 So. Car. 258; *Read v. St. Louis, etc., R. Co.*, 60 Mo. 199; *Denton v. Chicago, etc., R. Co.*, 52 Iowa 161, s. c. 35 Am. R. 263; *Baltimore, etc., Co. v. Brady*, 32 Md. 333; *Colton v. Cleveland, etc., R. Co.*, 67 Pa. St. 211, 5 Am. R. 424; *Mayo v. Preston*, 131 Mass. 304; *Davis v. Wabash, etc., R. Co.*, 89 Mo. 340; *Agnew v. Steamer Costa Rica*, 27 Cal. 425, s. c. 87 Am. Dec. 87; *Southern, etc., Co. v. Newby*, 36 Ga. 635, s. c. 91 Am. Dec. 783; *Van Winkle v. South Carolina R. Co.*, 38 Ga. 32; *Leonard v. Hendrickson*, 18 Pa. St. 40, s. c. 55 Am. Dec. 587; *Wertheimer v. Pennsylvania Co.*, 17 Blatchf. 421; *Toledo, etc., R. Co. v. Tapp*, 6 Ind. App. 304, s. c. 33 N. E. R. 462. See, generally, *Dunson v. New York, etc., R. Co.*, 3 Lans. 265; *Condict v. Grand Trunk, etc., R. Co.*, 54 N. Y. 500; *Lamb v. Camden, etc., Transp. Co.*, 2 Daly (N. Y.) 454; *Heyl v. Inman, etc., Co.*, 14 Hun 564; *Whitworth v. Erie R. Co.*, 87 N. Y. 413; *Beach v. Raritan, etc., Co.*, 37 N. Y. 457; *Long v. Pennsylvania R. Co.*, 147 Pa. St. 343; *Craig v. Chidress, Peck (Tenn.)* 270, s. c. 14 Am. Dec. 751; *Lamb v. Camden, etc., R. Co.*, 46 N. Y. 271, s. c. 7 Am. R. 327.

<sup>2</sup> In *Railroad Co. v. Reeves*, 10 Wall. 176, the court said: "One of the instances always mentioned by the elementary writers of loss by the act

of God is the case of loss by flood and storm. Now, when it is shown that the damage resulted from this cause immediately he is excused. What is to make him liable after this? No question of his negligence arises unless it is made by the other party. It is not necessary for him to prove affirmatively that the cause was such as releases him and then to prove affirmatively that he did not contribute to it." See authorities cited in preceding note and see, also, *Magnin v. Dinsmore*, 56 N. Y. 168; *Wolf v. American, etc., Co.*, 43 Mo. 421, s. c. 97 Am. Dec. 406; *The J. C. Stevenson*, 17 Fed. R. 540; *Little Rock, etc., R. Co. v. Corcoran*, 40 Ark. 375.

<sup>3</sup> *Brown v. Adams, etc., Co.*, 15 W. Va. 812; *Ryan v. Missouri, etc., R. Co.*, 65 Tex. 13, s. c. 57 Am. R. 589; *Steele v. Townsend*, 37 Ala. 247, s. c. 79 Am. Dec. 49; *Grey v. Mobile, etc., Co.*, 55 Ala. 387, s. c. 28 Am. R. 729; *Erie R. Co. v. Lockwood*, 28 Ohio St. 358; *Richmond, etc., R. Co. v. White*, 88 Ga. 805. See, generally, *Shriver v. Sioux City, etc., R. Co.*, 24 Minn. 506, s. c. 31 Am. R. 353; *Graham v. Davis*, 4 Ohio St. 362, s. c. 62 Am. Dec. 285; *Richmond, etc., R. Co. v. Benson*, 86 Ga. 203, s. c. 22 Am. St. R. 446; *Richmond, etc., R. Co. v. White*, 88 Ga. 805.

negligence of the carrier concurs or co-operates in causing the loss the rule that the act of God exonerates the carrier from liability will not apply, for the negligence of the carrier will be deemed the proximate cause of the loss.<sup>1</sup> The carrier is exonerated from liability only in cases where the act of God is the proximate cause of the loss, and not where the act of God is a remote cause,<sup>2</sup> so that the burden is on the carrier to prove that the act of God was the proximate cause of the loss. Some of the authorities, indeed, require the carrier to show that the act of God was the sole cause of the loss.<sup>3</sup>

§ 1458. **Public enemies.**—The term “public enemies” means those with whom the country is at war, and does not include thieves, rioters or mere insurgents.<sup>4</sup> Where, however, the in-

<sup>1</sup> *McGraw v. Baltimore, etc., R. Co.*, 18 W. Va. 361, s. c. 41 Am. R. 696; *Wolf v. American, etc., Co.*, 43 Mo. 421; *Columbia, etc., Co. v. Bason*, 1 Harp. L. (S. Car.) 262; *Williams v. Grant*, 1 Conn. 487, s. c. 7 Am. Dec. 235; *Hand v. Baynes*, 4 Whart. 204; *Campbell v. Morse*, 1 Harp. L. (S. Car.) 468. See, generally, *Dunson v. New York, etc., R. Co.*, 3 Lans. 265; *Peck v. Weeks*, 34 Conn. 145; *Amies v. Stevens*, 1 Stra. 128; *Siordet v. Hall*, 4 Bing. 607, 13 E. C. L. 657; *Wing v. New York, etc., R. Co.*, 1 Hilt. (N.Y.) 235; *Philleo v. Sandford*, 17 Tex. 227; *Packard v. Taylor*, 35 Ark. 402, s. c. 37 Am. R. 37; *Hart v. Allen*, 2 Watts (Pa.) 114; *Thomas v. Wabash, etc., R. Co.*, 62 Fed. R. 200, 4 Interest Com. R. 802.

<sup>2</sup> *Railroad Co. v. Reeves*, 10 Wall. 176; *Sullivan v. Philadelphia, etc., R. Co.*, 30 Pa. St. 234; *Proprietors of Trent, etc., Navigation v. Woop*, 4 Doug. 287; *Hays v. Kennedy*, 41 Pa. St. 378, s. c. 80 Am. Dec. 627; *Merritt v. Earle*, 31 Barb. 38; *McArthur v. Sears*, 21 Wend. 190; *Merritt v. Earle*, 29 N. Y. 115, s. c. 86 Am. Dec.

292; *Express Co. v. Jackson*, 92 Tenn. 326; *McHenry v. Philadelphia, etc., R. Co.*, 4 Harr. (Del.) 448; *Chicago, etc., R. Co. v. Shea*, 66 Ill. 471; *Read v. Spaulding*, 30 N. Y. 630, s. c. 86 Am. Dec. 426; *Sprowl v. Kellar*, 4 Stewart & P. (Ala.) 382; *Coosa, etc., Co. v. Barclay*, 30 Ala. 120; *Steele v. McTyer*, 31 Ala. 667, s. c. 70 Am. Dec. 516; *Backhouse v. Sneed*, 1 Murph. (N. Car.) 173.

<sup>3</sup> *Read v. Spaulding*, 30 N. Y. 630, s. c. 86 Am. Dec. 426; *Michaels v. New York, etc., R. Co.*, 30 N. Y. 564, s. c. 86 Am. Dec. 415; *Merritt v. Earle*, 29 N. Y. 115; *McHenry v. Philadelphia, etc., R. Co.*, 4 Harr. (Del.) 448; *Siordet v. Hall*, 4 Bing. 607; *Crosby v. Fitch*, 12 Conn. 410, s. c. 31 Am. Dec. 745; *Harmony v. Bingham*, 12 N. Y. 99, s. c. 62 Am. Dec. 142; *Davis v. Garrett*, 6 Bing. 716. But see *Morrison v. Davis*, 20 Pa. St. 171, s. c. 57 Am. Dec. 695; *Denny v. New York, etc., R. Co.*, 13 Gray 481, s. c. 74 Am. Dec. 645.

<sup>4</sup> *Coggs v. Bernard*, 2 Ld. Raym. 909; *Gage v. Tirrell*, 9 Allen 299; *Seligman v. Armijo*, 1 N. Mex. 459.

surgents have so gathered strength as to involve the country in a civil war they are regarded as public enemies.<sup>1</sup> It is not necessary in order to constitute persons in arms against the government public enemies that there should be formal or open declaration of war, for if there be an actual state of war those engaged against the government are public enemies.<sup>2</sup> It is the duty of the carrier to use due care and diligence to prevent the capture or destruction of goods by public enemies, and although the carrier is not liable when the loss is caused by the act of public enemies simply because of the loss, it is liable if its negligence contributed to the loss.<sup>3</sup> The principle which supports the rule that the burden of proof is on the carrier to show that the loss was caused by the act of God requires that it be held that the burden is on the carrier who claims exoneration on the ground that the loss was caused by public enemies to prove that fact. We are inclined to the opinion that where the carrier defends upon the ground that the loss was caused by the public enemies it must supplement evidence that it was so caused by evidence that its negligence did not contribute to the loss, for the course pursued by it must be a matter peculiarly within its own knowledge.

§ 1459. **Public enemies—Mobs—Strikes.**—Under the ancient rule the carrier was responsible for the loss of goods although the loss or injury was caused by the acts of mobs or riotous law breakers.<sup>4</sup> The general doctrine still prevails

<sup>1</sup> *Thorington v. Smith*, 8 Wall. 1; *Nashville, etc., R. Co. v. Estes*, 10 Lea 747; *McCranie v. Wood*, 24 La. Ann. 406; *Philadelphia, etc., R. Co. v. Harper*, 29 Md. 330; *Holladay v. Kennard*, 12 Wall. 254; *Southern, etc., Co. v. Womack*, 1 Heisk. 256; *United States v. Palmer*, 3 Wheat. 610; *Mauran v. Ins. Co.*, 6 Wall. 1; *Nesbitt v. Lushington*, 4 T. R. 783; *Bland v. Adams, etc., Co.*, 1 Duvall 232.

<sup>2</sup> *Holladay v. Kennard*, 12 Wall. 254.

<sup>3</sup> *Coggs v. Bernard*, 2 Lord Raym. 909; *Railway Co. v. Nevill*, 60 Ark. 375, s. c. 30 S. W. R. 425, 28 L. R. A. 80; *Chevallier v. Straham*, 2 Tex. 115, s. c. 47 Am. Dec. 639; *Forward v. Pittard*, 1 T. R. 27; *Patton v. Magrath*, *Dudley Law* (S. Car.) 159, s. c. 31 Am. Dec. 552; *Swindler v. Hilliard*, 2 Rich. Law (S. Car.) 286, s. c. 45 Am. Dec. 732. For a strong statement of the rule, see *McArthur v. Sears*, 21 Wend. 190.

<sup>4</sup> *The Prize Cases*, 2 Black 635; *Alexander's Cotton*, 2 Wall. 404.

although it has been greatly modified by the modern decisions. The weight of authority now is that while the violent acts of a mob may not exonerate the carrier where the goods are destroyed,<sup>1</sup> such acts may exonerate the carrier from liability for loss resulting from delay.<sup>2</sup> The doctrine just stated is applied although the mob is composed of employes of the company who have engaged in a strike,<sup>3</sup> but we suppose that the acts of the strikers must be of such a character as to prevent the operation of the road and that the company will not be exonerated from liability unless it exercises care and diligence to move its trains, for the duty of exercising care rests upon the carrier under all circumstances;<sup>4</sup> but what constitutes sufficient care and diligence to relieve the carrier must depend upon the facts of the particular case. Due diligence requires that proper effort should be made to supply the place of strik-

<sup>1</sup> *Hall v. Pennsylvania Railroad Co.*, 14 Phila. 414; *Railway Co. v. Nevill*, 60 Ark. 375, s. c. 46 Am. St. R. 209; *Hutchinson on Carriers*, § 204.

<sup>2</sup> *Ilaas v. Kansas City, etc., R. Co.*, 81 Ga. 792, s. c. 35 Am. & Eng. R. Cas. 572; *Gulf, etc., R. Co. v. Levi*, 76 Tex. 337, s. c. 8 L. R. A. 323; *Pittsburgh, etc., R. Co. v. Hollowell*, 65 Ind. 188; *Lake Shore, etc., R. Co. v. Bennett*, 89 Ind. 457, s. c. 6 Am. & Eng. R. Cas. 402; *Geismer v. New York, etc., R. Co.*, 102 N. Y. 563, s. c. 55 Am. R. 837; *Little v. Fargo*, 43 Hun 233; *Hamilton v. Western, etc., R. Co.*, 96 N. Car. 398; *Bartlett v. Pittsburgh, etc., R. Co.*, 94 Ind. 281; *Hick v. Rodocanachi*, L. R. (1891) 2 Q. B. 626; *Pittsburg, etc., R. Co. v. Hazen*, 84 Ill. 36, s. c. 25 Am. R. 422. See Mr. Freeman's note to *Norris v. Savannah, etc., R. Co.*, 11 Am. St. R. 355, 365; *Louisville, etc., R. Co. v. Queen City, etc., Co.*, (Ky.) 35 S. W. R. 626.

<sup>3</sup> *Southern, etc., R. Co. v. Johnson*, (Tex.) 15 S. W. R. 121, s. c. 45 Am. & Eng. R. Cas. 338; *Southern, etc.,*

*R. Co. v. Stell*, (Tex.) 15 S. W. R. 122; *International, etc., R. Co. v. Tisdale*, 74 Tex. 8, s. c. 11 S. W. R. 900. Some of the cases make the distinction between cases where the rioters are employes and cases where they are strangers. *Indianapolis, etc., R. Co. v. Juntgen*, 10 Bradw. (Ill. App.) 295; *Wertheimer v. Pennsylvania Co.*, 17 Blatchf. 421; *Sherman v. Pennsylvania Co.*, 1 Fed. R. 226, s. c. 3 Am. & Eng. R. Cas. 274. We think that there is no sufficient reason for the distinction, for where the mob is such that the public authorities can not quell it and the carrier exercises due care and diligence by making reasonable efforts to move its trains there is no just reason for holding the carrier liable for damages resulting from delay.

<sup>4</sup> *Weed v. Panama R. Co.*, 17 N. Y. 362; *Blackstock v. New York, etc., R. Co.*, 20 N. Y. 48; *Pittsburg, etc., R. Co. v. Hazen*, 84 Ill. 36, s. c. 25 Am. R. 422.

ing employes and to secure the movement of trains.<sup>1</sup> In one of the cases delay was caused by the acts of striking employes of one of the connecting carriers, the carrier deviated from the prescribed route, but did so without informing the consignor, the property, (potatoes), was taken back to one of the places on the route and sold, and it was held that while an unforeseen necessity might justify a deviation the carrier was liable because it had not consulted the owner of the property.<sup>2</sup>

§ 1460. **Mobs—Violence of does not relieve where there is an express contract.**—The authorities require the conclusion that where there is an express contract wherein the carrier undertakes without limitation or qualification to safely carry and deliver within a time definitely fixed by the contract the fact that a mob prevents the carrier from performing the contract will not exonerate it from liability for loss of the goods. The theory of the decisions is that the carrier if it desires to avail itself of the acts of mobs as a ground of defense must so stipulate in the contract under which it undertakes to carry the property. A distinction is made between cases where there is no express contract to carry and deliver within a limited time and cases where there is such an express contract.

§ 1461. **Public authority—When exercise of exonerates carriers.**—Railroad carriers, as are all persons artificial or natural, are bound to yield obedience to the law. They have neither the right, nor, in the true sense, the power to disregard the law or defy the public authority. In yielding to the law and its ministers they yield to necessity, and “necessity privileges a person acting under its influence.” If there is no fault of the carrier contributing to the loss or destruction of goods ac-

<sup>1</sup> Central, etc., Co. v. Georgia, etc., Heisk. 253; Hutchinson on Carriers, Exch., 91 Ga. 389, s. c. 55 Am. & Eng. § 14; Ray Negligence of Imposed R. Cas. 606. Duties, § 79. The same doctrine is

<sup>2</sup> Louisville, etc., R. Co. v. Odill, laid down in Alabama, etc., R. Co. v. (Tenn.) 33 S. W. R. 611, citing Louisville, etc., R. Co. v. Campbell, 7 Brichetto, 72 Miss. 891, 18 So. R. 421.

cepted by it for transportation it is exonerated from liability where the goods are taken from it or are lost or destroyed by public authority.<sup>1</sup> But if the wrong of the carrier contributes to the loss it will not be exonerated. If the legal proceedings be had at the instance, or, as it is held, with the connivance of the carrier they will not protect it.<sup>2</sup> The proceedings in order to protect the carrier must, at least, appear to be valid, since no protection is afforded by proceedings that have not the appearance of validity.<sup>3</sup> Where proceedings are taken against the carrier it must, with promptness, diligence and care, give the owner notice thereof.<sup>4</sup>

§ 1462. When the liability of the company as a common carrier attaches.—The liability of a railroad company as a common carrier does not attach until the goods have come into its hands in its capacity of a carrier. Thus, the fact that a railroad company entered into a contract to reship goods from a place to which they had been carried by mistake of the shipper does not of itself fasten upon the company the duty or liability of a common carrier of goods, and it is not responsible for the loss of such goods by fire while in a warehouse awaiting reshipment.<sup>5</sup> It has been held, however, that where goods

<sup>1</sup> *Bliven v. Hudson River R. Co.*, 36 N. Y. 403, 407; *Wells v. Main, etc.*, Co., 4 Cliff. 228, Fed. Cases, 17, 401; *Railroad Co. v. O'Donnell*, 49 Ohio St. 489, 500, s. c. 32 N. E. R. 476; *Atkinson v. Ritchie*, 10 East 530; *Bliven v. Hudson River, etc.*, R. Co., 35 Barb. 188. See *Kidd v. Pearson*, 128 U. S. 1; *Thurlow v. Massachusetts*, 5 How. 504; *Mugler v. Kansas*, 123 U. S. 623; *Railroad Co. v. Husen*, 95 U. S. 465; *Pingree v. Detroit, etc.*, R. Co., 66 Mich. 143. It has been held that process issued under an unconstitutional statute will protect the carrier. *McAlister v. Chicago, etc.*, R. Co., 74 Mo. 351.

<sup>2</sup> *Robinson v. Memphis, etc.*, R. Co., 16 Fed. R. 57.

<sup>3</sup> *Jewett v. Olsen*, 18 Ore. 419; *Nickey v. St. Louis, etc.*, R. Co., 35 Mo. App. 79; *Bennett v. American Express Co.*, 83 Me. 236, s. c. 22 Atl. R. 159.

<sup>4</sup> *Kiff v. Old Colony, etc.*, R. Co., 117 Mass. 591; *Ohio, etc.*, R. Co. v. *Yohe*, 51 Ind. 181; *Railroad Co. v. O'Donnell*, 49 Ohio St. 489, s. c. 32 N. E. R. 476. See, generally, *Faust v. South Car., etc.*, R. Co., 8 So. Car. 118; *Miersen v. Hope*, 2 Sweeney (N. Y.) 561; *Robinson v. Memphis, etc.*, R. Co., 16 Fed. R. 57.

<sup>5</sup> *Ante*, § 1404; *Treleven v. Northern, etc.*, R. Co., 89 Wis. 598, s. c. 62 N. W. R. 536. See *Stewart v. Gracy*, 93 Tenn. 314, s. c. 27 S. W. R. 664. In the case last cited the court distinguished the

are in the possession of a railroad company as a warehouseman and have been in such possession for some time, and while in its possession it receives, but does not obey instructions to ship them, its liability as a common carrier attaches at the time it receives the directions to ship the goods.<sup>1</sup> In another case it was held that where goods were stored in the warehouse of a railroad company by a shipper to be transported from time to time the liability of the company as a common carrier did not attach until the goods were set apart for shipment.<sup>2</sup> But it is held that where goods are delivered to a railroad company for immediate shipment and the company for its own convenience and because it has no cars in which to transport the goods places them in its warehouse it is liable as a common carrier and not simply as a warehouseman.<sup>3</sup> The duty of a railroad company as a common carrier begins when it accepts goods for transportation and is placed in complete control of them for the purpose of transporting them, although it may not issue a formal receipt or bill of lading for them.<sup>4</sup>

cases of *Deming v. Merchants', etc.*, Co., 90 Tenn. 306, s. c. 17 S. W. R. 89; *Watson v. Memphis, etc., R. Co.*, 9 Heisk. 255, saying: "But in the case at bar the tobacco was not deposited with an agent of the carriers, but it was left in the custody of an agent of the shipper and constructively in the possession of the shipper himself. The carriers in this case did not execute a bill of lading or receipt for the property, nor did they in any way acknowledge that the property was in their custody."

<sup>1</sup> *Schmidt v. Chicago, etc., R. Co.*, 90 Wis. 504, s. c. 63 N. W. R. 1057. The court held that: "The more stringent liability of a common carrier attaches whenever the immediate duty of transportation arises." The court cited 2 Redfield on Ry. (6th ed.) 174; *Barron v. Eldredge*, 100 Mass. 455.

<sup>2</sup> *Milloy v. Grand Trunk, etc., R. Co.*, 21 Ont. App. 404.

<sup>3</sup> *London, etc., Co. v. Rome, etc., R.*

*Co.*, 144 N. Y. 200, s. c. 39 N. E. R. 79, 43 Am. St. R. 752, 61 Am. & Eng. R. Cas. 225. In the case cited it was said: "The entire weight of the responsibility rigorously imposed by law upon a common carrier falls upon him contemporaneously (*co-instante*) with a complete delivery of the goods to be forwarded, if accepted, with or without a special agreement as to reward, for the obligation to carry safely on delivery carries with it a promise to keep safely before the goods are put *in itinere*." The cases of *Judson v. Western R. Co.*, 4 Allen 520, s. c. 81 Am. Dec. 718; *Barron v. Eldredge*, 100 Mass. 455, s. c. 1 Am. R. 126; *Grosvenor v. New York, etc., R. Co.*, 39 N. Y. 34; *O'Neill v. New York, etc., R. Co.*, 60 N. Y. 138, were cited. Reference was made to Redfield on Carriers, 80; Angell on Carriers, § 129. The case of *Wilson v. Atlanta, etc., R. Co.*, 82 Ga. 386, was distinguished.

<sup>4</sup> *St. Louis, etc., R. Co. v. Murphy*,

§ 1463. **Railroad company as a warehouseman**—**General doctrine.**—The rule is that a railroad company is not held to the extraordinary duty and liability of a common carrier unless it has custody or control of the property in its capacity as such carrier, and this doctrine applies to a railroad company in possession of property in the capacity of a warehouseman. Where the company holds possession of property as a warehouseman it is not an insurer, and it is not liable unless it appears that its negligence contributed to the loss of the property.<sup>1</sup> It is, of course, a bailee, and under a duty to exercise ordinary care and diligence, but it is under no greater duty. If the goods are held as a warehouseman by the company, no recovery can be obtained against it unless it was guilty of a breach of duty in failing to exercise ordinary care and diligence.<sup>2</sup> If the duty as a carrier has terminated and that of a warehouseman attached, the company is still liable for the wrongful acts of its employes acting within the scope of their employment. Thus, where goods are carried to their destination and notice given, the company is, nevertheless, responsible for the loss of goods if its employes give incorrect information to the consignee which so misleads him as to prevent him from removing the goods.<sup>3</sup> So, where the employes of

60 Ark. 333, s. c. 30 S. W. R. 419; *O'Neill v. New York, etc., R. Co.*, 60 N. Y. 138; *Rogers v. Wheeler*, 52 N. Y. 262; *Wells v. Wilmington, etc., R. Co.*, 6 Jones (N. Car.) 47; *Merriam v. Hartford, etc., R. Co.*, 20 Conn. 354, s. c. 52 Am. Dec. 344; *Illinois, etc., R. Co. v. Smyser*, 38 Ill. 354; *Evansville, etc., R. Co. v. Keith*, 8 Ind. App. 57, s. c. 35 N. E. R. 296; *London, etc., Co. v. Rome, etc., R. Co.*, 68 Hun 598, s. c. 23 N. Y. Supp. 231; *Montgomery, etc., Ry. Co. v. Kolb*, 73 Ala. 396. See, generally, *Pittsburgh, etc., R. Co. v. Barrett*, 36 Ohio St. 448; *Galena, etc., R. Co. v. Rae*, 18 Ill. 488; *Packard v. Getman*, 6 Cowen 757, s. c. 16 Am. Dec. 475; *Trowbridge v. Chapin*, 23 Conn. 595.

<sup>1</sup> *Ante*, § 1405.

<sup>2</sup> *Mitchell v. Lancashire, etc., R. Co.*, L. R. 10 Q. B. 256; *Hudson v. Baxendale*, 2 Hurls. & N. 575; *Neal v. Wilmington, etc., R. Co.*, 8 Jones Law 482; *Chicago, etc., R. Co. v. Jenkins*, 103 Ill. 588; *Lane v. Boston, etc., R. Co.*, 112 Mass. 455; *Stowe v. New York, etc., R. Co.*, 113 Mass. 521; *Galveston, etc., R. Co. v. Smith*, (Tex. Civ. App.) 28 S. W. R. 110; *Morris, etc., R. Co. v. Ayres*, 29 N. J. L. 393, s. c. 80 Am. Dec. 215.

<sup>3</sup> *Central, etc., Co. v. East Tennessee, etc., R. Co.*, 70 Fed. R. 764, (citing *Butler v. East Tenn., etc., R. Co.*, 8 Lea 32; *East Tennessee, etc., R. Co. v. Kelly*, 91 Tenn. 699, s. c. 20 S. W. R. 312); *Jeffersonville, etc., R. Co. v. Cot-*



the company violate a promise to the owner and ship the goods contrary to his directions, a wrong is committed which renders the company liable for the loss of the goods by an accidental fire.<sup>1</sup> The rule that the company, in its capacity as a warehouseman, is not liable except where its negligence contributes to the loss, protects it from liability for goods destroyed by an accidental fire,<sup>2</sup> unless its breach of duty or of contract contributes to the loss, and it is only upon the ground that there is a breach of duty that the cases cited in the notes can be supported. It seems to us, although there is conflict upon the question, that where the company shows safe carriage of goods to their destination and performance of its duty as a carrier, the burden of proving negligence is on the plaintiff.<sup>3</sup> We do not mean to be understood as saying that the burden is on the plaintiff to show that the duty of the company as a carrier has terminated (we do not here consider the question as to who has the burden in cases where the carrier's liability is limited by contract), for we are here speaking of the rule where that duty has terminated and the duty of a warehouseman attached. There is, as we believe, reason for discriminating between the classes of cases mentioned, but there is authority supporting the proposition that the burden is on the railroad company to disprove negligence.<sup>4</sup> It is, of

ton, 29 Ind. 498, s. c. 95 Am. Dec. 656; Burlington, etc., R. Co. v. Arms, 15 Neb. 69, s. c. 17 N.W. R. 351; Faulkner v. Hart, 82 N. Y. 413; Richmond, etc., R. Co. v. Benson, 86 Ga. 203, s. c. 12 S. E. R. 357. The general doctrine stated in the text has been applied to the loss of a passenger's baggage. Kansas City, etc., R. Co. v. Morrison, 34 Kan. 502, s. c. 9 Pac. R. 225, citing Atchison, etc., R. Co. v. Brewer, 20 Kan. 669; Chicago, etc., R. Co. v. Conklin, 32 Kan. 55, s. c. 3 Pac. R. 762; Thompson on Carriers, 530. The doctrine is probably somewhat too broadly stated in some of the Kansas cases.

<sup>1</sup> Campion v. Canadian, etc., R. Co., 43 Fed. R. 775.

<sup>2</sup> Pindell v. St. Louis, etc., R. Co., 41 Mo. App. 84; Fenner v. Buffalo, etc., R. Co., 44 N. Y. 505, s. c. 4 Am. R. 709.

<sup>3</sup> The Guiding Star, 53 Fed. R. 936; Lyndsay v. Connecticut, etc., R. Co., 27 Vt. 643; Chenoweth v. Dickinson, 8 B. Monr. 156; Morehead v. Brown, 6 Jones (N. Car.) 367; The Buckeye, 7 Biss. 23. See, New Orleans, etc., R. Co. v. Faler, 58 Miss. 911; Russell Manufacturing Co. v. New Haven Steamboat Co., 50 N. Y. 121.

<sup>4</sup> Wilson v. California, etc., R. Co., 94 Cal. 166, s. c. 17 L. R. A. 685, citing Hutchinson on Carriers, §§ 354, 355. Mr. Hutchinson, after speaking of some of the things that the carrier

course, true that where there is a complete delivery to the company in its capacity of a common carrier, and it holds the goods as such, no question of negligence arises except in cases where there is a contract limiting its liability.<sup>1</sup> In cases of accidental fires, some of the courts, as against carriers, trench somewhat upon the rule that there can be no recovery unless the negligence is the proximate cause of the injury, and it is hardly too much to say that some of the cases declare an anomalous rule peculiar to carriers,<sup>2</sup> for they unquestionably extend the relation of cause and effect beyond that required to authorize a recovery in other cases where the right of recovery is based upon negligence. The doctrine of proximate cause has, of course, comparatively little force where the liability is strictly the extraordinary one of a common carrier,<sup>3</sup> but it is difficult to perceive why it should not prevail where the liability is that of a warehouseman and not that of a carrier of things.

**§ 1464. When the liability of a railroad company is that of a warehouseman.**—Goods may be received under a contract,

may show in defense, says: "He may further show that the loss which has occurred was not attributable to his fault or negligence and thereby exonerate himself from liability." He cites *Fenner v. Buffalo, etc., R. Co.*, 44 N. Y. 505; *Weed v. Barney*, 45 N. Y. 344; *Hudson v. Baxendale*, 2 Hurl. & N. 575; *Kremer v. Southern, etc., Co.*, 6 Cold. 356; *Fisk v. Newton*, 1 Denis 45; *Neal v. Wilmington, etc., R. Co.*, 8 Jones L. (N. Car.) 482. But we do not think that the learned author is to be understood as affirming that the carrier has a double burden, that of proving, (1) that its liability as a carrier had terminated, and (2) that in the capacity of warehouseman it was not guilty of wrong.

<sup>1</sup> *Pearce v. The Thomas Neuton*, 41 Fed. R. 106; *Pollard v. Vinton*, 105 U. S. 7; *Bulkley v. Naumkeag, etc., Cot-*

*ton Co.*, 24 How. (U. S.) 386; *Schooner Freeman v. Buckingham*, 18 How. (U. S.) 182. See, generally, *Vandewater v. Mills*, 19 How. (U. S.) 82; *Scott v. The Ira Chaffee*, 2 Fed. R. 401; *The Missouri*, 30 Fed. R. 384; *The Hermitage*, 4 Blatchf. 474; *The Keokuk*, 9 Wall. 517; *The City of Baton Rouge*, 19 Fed. R. 461.

<sup>2</sup> *East Tennessee, etc., R. Co. v. Kelly*, 91 Tenn. 699, s. c. 20 S. W. R. 312, (distinguishing *Lamont v. Nashville, etc., Railroad Co.*, 9 Heisk. 58), and citing *Deming v. Merchants', etc., Storage Co.*, 90 Tenn. 306, s. c. 17 S. W. R. 89. But see *Railway Co. v. Manchester Mills*, 88 Tenn. 653, s. c. 14 S. W. R. 314; *Lancaster Mills v. Merchants', etc., Co.*, 89 Tenn. 1, s. c. 14 S. W. R. 317.

<sup>3</sup> *Richmond, etc., R. Co. v. Benson*, 86 Ga. 203, s. c. 12 S. E. R. 357.

express or implied, by a railroad company in the capacity of a warehouseman. It is obvious that where there is an express contract there can be very little question as to the nature of the liability, but there is sometimes difficulty, in cases where there is no such contract, in determining whether the goods are held by the company in the capacity of a warehouseman or in that of a common carrier. Ordinarily where goods are received for the purpose of being stored until ready for transportation they are in the possession of the company as a warehouseman,<sup>1</sup> but if received and accepted for transportation, that is, if there is a complete delivery to the company for transportation, it is held to have possession of the goods in its capacity of a common carrier.<sup>2</sup> The general rule is that when the goods have been carried to their destination, reasonable opportunity allowed the owner to remove them and proper notice given in cases where notice is required, as it is in some jurisdictions, but not all, the duty of the company as a common carrier terminates and that of a warehouseman begins.<sup>3</sup> There is, indeed, no

<sup>1</sup> *Basnight v. Atlantic, etc., R. Co.*, 111 N. C. 592; *Michigan, etc., Co. v. Schurtz*, 7 Mich. 515; *Judson v. Western, etc., R. Co.*, 4 Allen 520, s. c. 81 Am. Dec. 718; *Barron v. Eldredge*, 100 Mass. 455, 1 Am. R. 126; *Pittsburgh, etc., R. Co. v. Barrett*, 36 Ohio St. 448.

<sup>2</sup> *Ante*, § 1405; *Milloy v. Grand Trunk, etc., R. Co.*, 21 Ont. App. 404; *Gregory v. Wabash, etc., R. Co.*, 46 Mo. App. 574; *Schmidt v. Chicago, etc., R. Co.*, 90 Wis. 504, s. c. 63 N. W. R. 1057; *London, etc., Co. v. Rome, etc., R. Co.*, 144 N. Y. 200, 61 Am. & Eng. R. Cas. 225, s. c. 43 Am. St. R. 752; *Ackley v. Kellogg*, 8 Cow. 223; *Garside v. Trent, etc., Navigation*, 4 T. R. 581, What constitutes a complete delivery to a carrier is defined in *Merriam v. Hartford, etc., R. Co.*, 20 Conn. 354, s. c. 52 Am. Dec. 344; *Packard v. Gatman*, 6 Cow. 757, s. c. 16 Am. Dec.

475. As to delivery to a subordinate employe, see, *Minter v. Pacific, etc., R. Co.*, 41 Mo. 508, s. c. 97 Am. Dec. 288.

<sup>3</sup> *Southwestern R. Co. v. Felder*, 46 Ga. 433; *Western, etc., R. Co. v. Camp*, 53 Ga. 599; *Backhaus v. Chicago, etc., R. Co. (Wis.)* 66 N. W. R. 400; *Southern Express Co. v. Holland, (Ala.)* 19 So. R. 66; *Wood v. Crocker*, 18 Wis. 345; *Moses v. Boston, etc., R. Co.*, 24 N. H. 71, s. c. 55 Am. Dec. 222; *Moses v. Boston, etc., R. Co.*, 32 N. H. 523, s. c. 64 Am. Dec. 381; *Lemke v. Chicago, etc., R. Co.*, 39 Wis. 449; *Wood v. Milwaukee, etc., R. Co.*, 27 Wis. 541, s. c. 9 Am. R. 465; *Gregg v. Illinois, etc., R. Co.*, 147 Ill. 550, s. c. 35 N. E. R. 343; *Stanard, etc., Co. v. White Line, etc., Co.*, 122 Mo. 258, s. c. 26 S. W. R. 704; *Bassett v. Connecticut, etc., R. Co.*, 145 Mass. 129; *Blaisdell v. Con-*

substantial diversity of opinion upon the proposition as we have stated it, but there is stubborn conflict as to whether the extraordinary liability terminates until the consignee has had notice and reasonable opportunity to remove the goods. Notice to the consignee is held by some of the courts to be necessary to terminate the liability as a carrier, but other courts emphatically affirm a different rule, holding that notice is not essential to terminate the liability of the company as a common carrier of goods.<sup>1</sup> It is to be observed, as a

necticut, etc., R. Co., 145 Mass. 132; *Mitchell v. Lancashire, etc., R. Co.*, L. R. 10 Q. B. 256; *Bourne v. Gatcliffe*, 7 Man. & G. 850; *Chapman v. Great Western, etc., R. Co.* L. R. 5 Q. B. Div. 278; *Crouch v. Great Western, etc., R. Co.*, 27 L. J. Exch. 345; *Heugh v. London, etc., R. Co.*, L. R. 5 Exch. 51; *Byrne v. Boadle*, 2 Hurlst. & C. 722. See, generally, *State v. Creeden*, 78 Iowa 556, s. c. 7 L. R. A. 295; *Francis v. Dubuque, etc., R. Co.*, 25 Iowa 60, s. c. 95 Am. Dec. 769; *Bansemmer v. Toledo, etc., R. Co.*, 25 Ind. 434; *Merchants', etc., Co. v. Merriam*, 111 Ind. 5; *Independence, etc., Co. v. Burlington, etc., R. Co.*, 72 Iowa 535; *McMahon v. Davidson*, 12 Minn. 357; *Fenner v. Buffalo, etc., R. Co.*, 44 N. Y. 505, s. c. 4 Am. R. 709; *Pindell v. St. Louis, etc., R. Co.*, 41 Mo. App. 84; *Cincinnati, etc., R. Co. v. McCool*, 26 Ind. 140. Upon the principle stated in the text the duty to passengers who leave their baggage at the station after the arrival of the train and a reasonable time in which to remove it is that of a warehouseman. *Nealand v. Boston, etc., R. Co.*, 161 Mass. 67, s. c. 36 N. E. R. 592; *Ditman, etc., Co. v. Keokuk, etc., R. Co.*, 91 Iowa 416, s. c. 59 N. W. R. 257; *Goodbar v. Wabash, etc., R. Co.*, 53 Mo. App. 434.

<sup>1</sup>See *Moses v. Boston, etc., R. Co.*, 32 N. H. 523, s. c. 64 Am. Dec. 381; *Backhaus v. Chicago, etc., R. Co.* (Wis.) 66 N. W. R. 400; *Alabama, etc., R. Co. v. Kidd*, 35 Ala. 209; *Mobile, etc., R. Co. v. Prewitt*, 46 Ala. 63; *Louisville, etc., R. Co. v. Oden*, 80 Ala. 38; *Oumit v. Henshaw*, 35 Vt. 605; *Winslow v. Vermont, etc., R. Co.*, 42 Vt. 700; *Jeffersonville, etc., R. Co. v. Cleveland*, 2 Bush. 468; *Morris, etc., R. Co. v. Ayres*, 29 N. J. L. 393; *Maignan v. New Orleans, etc., R. Co.*, 24 La. Ann. 333; *Leavenworth, etc., R. Co. v. Maris*, 16 Kan. 333; *Fenner v. Buffalo, etc., R. Co.*, 44 N. Y. 505, s. c. 4 Am. R. 709; *Pinney v. First Div. St. Paul, etc., R. Co.*, 19 Minn. 251; *Derosia v. Winona, etc., R. Co.*, 18 Minn. 133; *Buckley v. Great Western, etc., R. Co.*, 18 Mich. 121; *McMillan v. Michigan, etc., R. Co.*, 16 Mich. 79; *Mitchell v. Lancashire, etc., R. Co.*, 10 L. R. Q. B. 256; *Columbus, etc., R. Co. v. Ludden*, 89 Ala. 612, s. c. 42 Am. & Eng. R. Cas. 404; *Graves v. Hartford, etc., R. Co.*, 38 Conn. 143, s. c. 9 Am. R. 369; *Wilson v. California, etc., R. Co.*, 94 Cal. 166; *Norway, etc., Co. v. Boston, etc., R. Co.*, 1 Gray 263, s. c. 61 Am. Dec. 423; *Barron v. Eldredge*, 100 Mass. 455; *Stowe v. New York, etc., R. Co.*, 113 Mass. 521; *Rice v. Hart*, 118 Mass. 201; *Porter v. Chicago, etc., R. Co.*, 20 Ill. 407; *Richards v. Michigan, etc., R. Co.*, 20 Ill. 404; *Chicago, etc., R. Co. v. Scott*, 42 Ill. 132; *Merchants', etc.,*

matter of importance that the rule is different between cases where goods are stored while in course of transportation and cases where they are stored before a complete delivery to the carrier or after they have been carried to their destination, for while in transit the liability of the company is that of a carrier and not that of a warehouseman,<sup>1</sup> except, perhaps, where the storage is by the direction of the consignor.<sup>2</sup>

§ 1465. **The duty to carry.**—By virtue of the character of railroad companies as common carriers of goods they are under a general duty to receive and carry, when properly offered, all goods of the kind they undertake or assume to transport.<sup>3</sup> But, as we have already said, and as will be hereafter shown, the duty to carry is not always an absolute one, for there may be conditions and circumstances which will excuse the carrier

R. Co. v. Hallock, 64 Ill. 284; Rotchild v. Michigan, etc., R. Co., 69 Ill. 164; McCarty v. New York, etc., R. Co., 30 Pa. St. 247; Shenk v. Philadelphia, etc., Propeller Co., 60 Pa. St. 109; National, etc., Steamship Co. v. Smart, 107 Pa. St. 492; Bansemer v. Toledo, etc., R. Co., 25 Ind. 434; Cincinnati, etc., R. Co. v. McCool, 26 Ind. 140; Mohr v. Chicago, etc., R. Co., 40 Iowa 579; Francis v. Dubuque, etc., R. Co., 25 Iowa 60, s. c. 95 Am. Dec. 769; Southwestern R. Co. v. Felder, 46 Ga. 433; Butler v. East Tenn., etc., R. Co., 8 Lea 32; Spears v. Spartanburg, etc., R. Co., 11 S. Car. 158; Kansas City, etc., Transfer Co. v. Neiswanger, 18 Mo. App. 103; Wilson, etc., Co. v. Louisville, etc., R. Co., 71 Mo. 203; Jackson v. Sacramento, etc., R. Co., 23 Cal. 268; Chalk v. Charlotte, etc., R. Co., 85 N. Car. 423.

<sup>1</sup> Railroad Co. v. Manufacturing Co., 16 Wall. 318; Michigan, etc., R. Co. v. Hale, 6 Mich. 243; Mills v. Michigan, etc., R. Co., 45 N. Y. 622.

<sup>2</sup> Hartman v. Louisville, etc., R. Co., 39 Mo. App. 88.

<sup>3</sup> New Jersey, etc., Co. v. Merchants' Bank, 6 How. (U. S. 344; Missouri Pacific R. Co. v. Fagan, 72 Tex. 127, s. c. 2 L. R. A. 75; Pickford v. Grand Junction, etc., R. Co., 8 Mees & W. 372; Peek v. North, etc., R. Co., 10 H. L. Cas. 473, 511; Harris v. Packwood, 3 Taunt. 264; Johnson v. Pensacola, etc., R. Co., 16 Fla. 623, s. c. 26 Am. R. 731; Kirby v. Western Union Tel. Co., 4 S. Dak. 105, 439, s. c. 30 L. R. A. 612. See, generally, Messenger v. Pennsylvania R. Co., 37 N. J. Law 531, s. c. 18 Am. R. 754; New England, etc., Co. v. Maine, etc., R. Co., 57 Me. 188, s. c. 2 Am. R. 31; McDuffee v. Portland, etc., R. Co., 52 N. H. 430, s. c. 13 Am. R. 72; Gulf, etc., R. Co. v. Trawick, 68 Tex. 314; Thomas v. Boston, etc., R. Co., 10 Met. (Mass.) 472; Rogers, etc., Works v. Erie, etc., Co., 20 N. J. E. 379; Contra Costa, etc., R. Co. v. Moss, 23 Cal. 323; Little Rock, etc., R. Co. v. Glidewell, 39 Ark. 487; East Tenn., etc., R. Co. v. Nelson, 1 Cold. 272; Norway, etc., Co. v. Boston, etc., R. Co., 1 Gray 263.

from receiving goods for transportation. Nor does the general rule we have stated prohibit a railroad carrier from limiting to some extent its common law liability, but that subject is elsewhere discussed and here we barely allude to it. A railroad carrier undertakes to transport goods offered to it when they are to be carried over its usual route and by the usual mode of transportation. While it is the duty of a railroad carrier to provide facilities for transporting goods usually carried by common carriers it is not bound to provide facilities for carrying articles of an extraordinary character requiring for their carriage means of a different kind or character from those it has adopted.<sup>1</sup>

**§ 1466. Refusal to carry—Excuses for.**—The general rule that a railroad company is under a duty to carry goods properly offered for transportation is, as we have indicated, subject among other limitations and qualifications to the limitation that its obligation extends only to the kind of goods the company undertakes to carry.<sup>2</sup> In other words, railroad companies are common carriers only as to those goods which are of the kind usually or professedly carried.<sup>3</sup> Thus, a railroad

<sup>1</sup> *Pittsburgh, etc., R. Co. v. Morton*, 61 Ind. 539, s. c. 28 Am. R. 682; *Coup v. Wabash, etc., R. Co.*, 56 Mich. 111, s. c. 56 Am. R. 374; *Pitlock v. Wells, etc., Co.*, 109 Mass. 452. See, generally, *Gordon v. Hutchinson*, 1 W. & S. 285; *Ballentine v. North, etc., Co.*, 40 Mo. 491; *Galena, etc., R. Co. v. Rae*, 18 Ill. 488; *Illinois Central R. Co. v. Cobb*, 64 Ill. 128; *Evansville, etc., R. Co. v. Duncan*, 28 Ind. 441; *Hales v. London, etc., R. Co.*, 4 Best & S. 66; *Peet v. Chicago, etc., R. Co.*, 20 Wis. 594; *In re Oxlade, North, etc., R. Co.*, 15 C. B. (N. S.) 680; *Johnson v. Pensacola, etc., R. Co.*, 16 Fla. 623, s. c. 26 Am. R. 731.

<sup>2</sup> *Post*, § 1474; *King v. Lennox*, 19 Johns. 235; *Tunnel v. Pettijohn*, 2 Harr. (Del.) 48; *Powell v. Mills*, 30 Miss. 231; *Beckman v. Shoues*, 5

*Rawle* 179; *Kemp v. Coughtry*, 11 Johns. 107.

<sup>3</sup> *Tunnel v. Pettijohn*, 2 Harr. (Del.) 48; *McManus v. Lancashire, etc., R. Co.*, 4 H. & N. 327, 28 L. J. Exch. 343; *Benett v. Peninsular, etc., S. B. Co.*, 6 C. B. 775; *Crosby v. Fitch*, 12 Conn. 410; *Williams v. Grant*, 1 Conn. 487; *Richards v. Gilbert*, 5 Day (Conn.) 415; *De Mott v. Laraway*, 14 Wend. (N. Y.) 225; *Bell v. Reed*, 4 Binn. (Penn.) 127; *Johnson v. Midland Ry. Co.*, 4 Exchq. 367, 18 L. J. Exch. 366; *Moriarty v. Harnden's Express*, 1 Daly (N. Y. C. P.) 227; *Michigan, etc., R. Co. v. McDonough*, 21 Mich. 165; *Powell v. Mills*, 30 Miss. 231; *Blower v. Great Western Ry. Co.*, L. R. 7 C. P. 655; *Illinois Cent., etc., Co. v. Cobb*, 64 Ill. 128; *Lake Shore v. Perkins*, 25 Mich. 329; *Thomas v. North Stafford-*

company which does not undertake to carry dogs can not be held liable as a common carrier to one whose dog was carried in violation of the rule and by virtue of a special agreement with the baggage-master.<sup>1</sup> A farther qualification of the general rule is that railroad companies are common carriers to the extent only of those means and methods of transportation which they own, use, or hold out to the public.<sup>2</sup> And the implied obligation of a railroad company as a common carrier, arising from its relation to the public, is limited by the termini of its own route. The fact that it has connections with other routes, extending beyond its own termini, which it does not operate, control, or own, does not, in the absence of a special contract, make it liable as a common carrier for a failure to carry, or furnish means to carry, merchandise over such other routes.<sup>3</sup> Again, goods may properly be refused which are ten-

shire R., 21 Sol. Jour. 183; *Citizens' Bank v. Nantucket S. B. Co.*, 2 Story 16. As to other goods carried by special agreement or as a matter of accommodation, railroad companies are private carriers or bailees for hire. *Railroad Co. v. Lockwood*, 17 Wall. 357; *Kimball v. Rutland, etc., Railroad*, 26 Vt. 247. See *Pfister v. Central P. R. Co.*, 70 Cal. 169, 11 P. Rep. 686, construing provision of California code that the duty of a carrier is confined to accepting and carrying property "of a kind that he undertakes or is accustomed to carry."

<sup>1</sup>Hutchinson on Carriers, 2d ed., § 78, citing *Honeyman v. Oregon, etc., Railroad*, 13 Ore. 352. But the company will be liable if dogs are permitted to be carried as "baggage-man's perquisites." *Cantling v. Hannibal, etc., Railroad*, 54 Mo. 385. There is no common carrier's liability by railroad companies for letters lost in the carriage of the mail. *Central Railroad v. Lampley*, 76 Ala. 357.

<sup>2</sup>*Pittsburgh, C. & St. L. R. Co. v. Morton*, 61 Ind. 539; *Coup v. Wabash*

R. Co., 56 Mich. 111. In *Elkins v. Boston & M. R. Co.*, 23 N. H. (3 Fost.) 275, it is held that a railroad company which occasionally carries goods in passenger trains is not a common carrier of goods in such trains. And similarly railroads which occasionally carry passengers in freight trains do not thereby become as to those trains carriers of passengers. *Murch v. Concord R. Co.*, 29 N. H. (9 Fost.) 9. They are not bound to carry except on usual trains. *In re Palmer and London, etc., R. Co.*, L. R. 1 C. P. 588; *Lane v. Cotton*, 1 Ld. Rayd. 646; *Donahoe v. London, etc., R. Co.*, 15 W. R. 772.

<sup>3</sup>*Pittsburgh, C. & St. L. R. Co. v. Morton*, 61 Ind. 539. See, also, *Crouch v. London & N. W. R. Co.*, 25 Eng. L. & Eq. 287; *Wheeler v. San Francisco & A. R. Co.*, 31 Cal. 46; *Pitlock v. Wells, Fargo & Co.*, 109 Mass. 452. In *Hunter v. Southern P. R. Co.*, 76 Tex. 195, 13 S. W. R. 190, it was held that the mere fact that a railroad company receives goods marked for a place beyond its own line does not import

dered in an unfit condition for transportation, or which are dangerous,<sup>2</sup> or which are reasonably believed to be dangerous.<sup>2</sup> And goods may be refused which are tendered during a press of business so unusual as to have exhausted an equipment which would have been sufficient for all reasonably expected demands,<sup>4</sup> or during a period of danger, as, for instance, from a mob.<sup>5</sup> They may be refused, too, for non-prepayment of freight.<sup>6</sup> The ob-

an agreement to transport the good to the destination named as a common carrier.

<sup>1</sup>Union Ex. Co. v. Graham, 26 Ohio St. 595; Munster v. Southeastern R. Co., 4 C. B. n. s. 676, 27 L. J. C P. 308; Hart v. Baxendale, 16 L. T. n. s. 390; Union Express Co. v. Graham, 26 Ohio St. 595.

<sup>2</sup>The Nith, 36 Fed. R. 86; 2 Pars. Cont. 174; Boston, etc., R. Co. v. Shidly, 107 Mass. 568.

<sup>3</sup>The Nitro-Glycerine Case, 15 Wall. (U. S.) 524. But unless there is reasonable ground for suspicion the carrier can not compel consignor to disclose the character of the goods. Nitro-Glycerine Case, 15 Wall. (U. S.) 524; Boston & Albany R. v. Shanly, 107 Mass. 568, 12 Am. L. R. N. S. 500.

<sup>4</sup>Peet v. Chicago & N. W. R., 20 Wis. 594, s. c. 91 Am. Dec. 446. Lovett v. Hobbs, 2 Shower 127; Riley v. Horne, 5 Bing. 217; Cole v. Goodwin, 19 Wend. 251; White v. Toncray, 9 Leigh 347; Robins, *ex parte*, 7 Dowl. 566. Particularly the carrier should decline to receive perishable goods. Tierney v. New York Central R. Co. 76 N. Y. 305. But a railroad company may not take advantage of such a condition as that stated in the text, so as to extend facilities to one customer to the injury of another. Houston, etc., R. Co. v. Smith, 63 Tex. 322, 22 Am. & Eng. R. Cas. 421. And see Cross v. Mc-

Faden, 1 Tex. Civ. App. 461, 20 S. W. R. 846. See, Toledo, etc., R. Co. v. Lockhart, 71 Ill. 627; Wibert v. New York, etc., R. Co., 12 N. Y. 245; Condict v. Grand Trunk, etc., R. Co., 54 N. Y. 500; Great Western, etc., R. Co. v. Burns, 60 Ill. 284. Press of business as excusing the refusal to transport has been elsewhere touched upon. *Post*, § 1470, *et seq.*

<sup>5</sup>Edwards v. Sherratt, 1 East 604; Phelps v. Illinois Co., 94 Ill. 548; Ill. Cen. R. Co. v. McClellan, 54 Ill. 58; Ill. C. R. Co. v. Cobb, 64 Ill. 128; Ill. C. R. Co. v. Ashmead, 58 Ill. 487; Ill. C. R. Co. v. Hornberger, 77 Ill. 457; Pearson v. Duane, 4 Wall. (U. S.) 605.

<sup>6</sup>Galena, etc., R. v. Rae, 18 Ill. 488; Shipper v. Penn. R., 47 Pa. St. 338; Wyld v. Pickford, 8 M. & W. 443; Batson v. Donovan, 4 B. & Ald. 21. It has been held that in an action for damages resulting from refusal to carry, an averment of a readiness to pay is as good as an averment of a tender. Pickford v. Grand Junction Railway, 8 M. & W. 372; Bastard v. Bastard, 2 Shower 81. The company can not sue for price of carriage until delivery of goods. Barnes v. Marshall, 18 Q. B. 785, 21 L. J. Q. B. 388. Premature shipment after notice that good will be held for prepayment of charges. *Campion v. Canadian P. R. Co.*, 43 Fed. R. 775. In *Randall v. Richmond & D. R. Co.*, 108 N. Car.



ligation of a railroad company to carry does not require it to accept goods from a person having no authority to deliver them,<sup>1</sup> but if goods are in good faith accepted from one having no right to deliver them and it carries them to their destination and there in good faith, yields them to the shipper it can not be held liable for a conversion.<sup>2</sup> If goods which it may properly reject are actually, not merely constructively, accepted for carriage the common carrier's liability attaches.<sup>3</sup>

§ 1467. **Discrimination—Unjust forbidden.**—The common law prohibits common carriers from making unjust discriminations, in furnishing facilities for transporting goods and in charges for transportation. The authorities agree that unjust discrimination is forbidden,<sup>4</sup> but as to what is to be regarded

612, 13 S. E. R. 137, it was held that in an action for damages for refusal to receive from a connecting line without prepayment freight billed to a certain flag station, the railroad company may show that it had a fixed regulation requiring prepayment on all freight consigned to that station, and that both plaintiff and the connecting line were advised thereof. Under Code N. C., § 1963, a company may lawfully refuse to receive freight offered by a connecting railway company without prepayment, though it does not demand prepayment of others, if the connecting railroad has notice that prepayment is required. *Randall v. Richmond & D. R. Co.*, 108 N. Car. 612, 13 S. E. R. 137. But if a company accepts freight without prepayment, it is bound to use the same care as if the freight charges had been prepaid. *St. Louis, etc., R. Co. v. Flannagan*, 23 Ill. App. 489.

<sup>1</sup> *Fitch v. Newberry*, 1 Doug. (Mich. 1.)

<sup>2</sup> *Gurley v. Armstead*, 148 Mass. 267; *Strickland v. Barrett*, 20 Pick. 415; *Leonard v. Tidd*, 3 Metc. 6; *Loring v. Mulcahy*, 3 Allen 575; *Metcalf v. McLaughlin*, 122 Mass. 84.

But while a carrier acting in good faith may be protected in delivering to the shipper although he was not the owner, it is, nevertheless, true that the carrier will be protected where the goods are actually delivered to the owner. *Shellenberg v. Fremont, etc., R. Co.*, 45 Neb. 487, s. c. 63 N. W. R. 859, 12 Am. R. & Corp. R. (Lewis) 27, and authorities cited in the note of Mr. Lewis.

<sup>3</sup> *Porcher v. Northeastern Railroad*, 14 Rich. L. 181; *Pickford v. Grand Junction Railway*, 12 M. & W. 766; *Hannibal, etc., R. Co. v. Swift*, 12 Wall. 262; *The David and Caroline*, 5 Blatch. 266; *Great Northern, etc., R. Co. v. Shepherd*, 8 Exch. 30, 14 Eng. L. & Eq. 367.

<sup>4</sup> *Mogul, etc., R. Co. v. McGregor*, L. R. 21 Q. B. D. 544; *Evershed v. London, etc., R. Co.*, L. R. 3 Q. B. D. 134; *Baxendale v. Eastern, etc., R. Co.*, 4 Com. B. (N. S.) 62; *Branley v. Southeastern, etc., R. Co.*, 12 Com. B. (N. S.) 63; *Louisville, etc., R. Co. v. Wilson*, 132 Ind. 517; *New England, etc., R. Co. v. Maine, etc., R. Co.*, 57 Me. 188; *McDuffee v. Portland, etc., R. Co.*, 52 N.

as unjust discrimination there is some diversity of opinion.<sup>1</sup> While it is true that the common law<sup>2</sup> forbids discrimination, what constitutes discrimination in such a sense, especially as to rates, has given rise to considerable discussion. Expressions in many of the opinions seem to indicate that even as to rates all shippers must be treated alike and one rate charged in all cases, but this presses the rule beyond its legitimate scope. The cases go so far as to affirm that "He" (the carrier) "is not required to treat all those who patronize him with absolute equality. It is his privilege to charge less than a fair compensation to one person, or to a class of persons, and others can not justly complain so long as he carries on

H. 430, s. c. 13 Am. R. 72; Fitchburg, R. Co. v. Gage, 12 Gray 393; Avinger v. South Carolina, etc., R. Co., 29 So. Car. 265; McCoy v. Cincinnati, etc., R. Co., 13 Fed. 3; Hays v. Pennsylvania Co., 12 Fed. R. 309; Chicago, etc., R. Co. v. People, 67 Ill. 11, s. c. 16 Am. R. 599; Messenger v. Pennsylvania R. Co., 37 N. J. L. 531, s. c. 18 Am. R. 754; Garton v. Bristol, etc., R. Co., 1 Best & S. 112; Scofield v. Railway Co., 43 Ohio St. 571, s. c. 54 Am. R. 846; Sharpless v. Mayor of Philadelphia, 21 Pa. St. 117, s. c. 59 Am. Dec. 759; Samuels v. Louisville, etc., R. Co., 31 Fed. R. 57; Nicholson v. Great Western, etc., R. Co., 5 C. B. (N. S.) 748; Bayles v. Kansas, etc., R. Co., 13 Colo. 181, 5 L. R. A. 480; Root v. Long Island, etc., R. Co., 114 N. Y. 300, 4 L. R. A. 331, 11 Am. St. R. 643; Union Pac. R. Co. v. United States, 117 U. S. 355; Ragan v. Aiken, 9 Lea 609, s. c. 42 Am. R. 684; *Ex parte* Benson, 18 So. Car. 38; Texas, etc., Co. v. Texas, etc., R. Co., 6 Fed. R. 426; Southern Express Co. v. Memphis, etc., R. Co., 8 Fed. R. 799; Kinsley v. Buffalo, etc., R. Co., 37 Fed. R. 181; Cowan v. Bond, 39 Fed. R. 54; Samuels v. Louisville, etc., R. Co., 31 Fed. R. 57; Story on Bailments, 508, n 3; 1

Wood on Railroads, 566; 2 Redfield on Railways, 95; Hutchinson on Carriers, § 243; 2 Beach on Railways, § 943; Ray Negligence of Imposed Duties Freight Carriers, 748; 2 Kent's Com. (13th ed.) 598; 2 Parsons on Contracts 175.

<sup>1</sup>Cook v. Chicago, etc., R. Co., 81 Iowa 551, s. c. 46 N. W. R. 1080, 3 Am. R. R. & Corp. Rep. (Lewis) 550; Louisville, etc., R. Co. v. Wilson, 132 Ind. 517; Burlington, etc., R. Co. v. Northwestern, etc., R. Co., 31 Fed. R. 652; State v. Cincinnati, etc., R. Co., 47 Ohio St. 130, s. c. 23 N. E. R. 928; Scofield v. Railway Co., 43 Ohio St. 571, s. c. 3 N. E. R. 907, 54 Am. R. 846; Sandford v. Railroad Co., 24 Pa. St. 378; Ragan v. Aiken, 9 Lea 609, s. c. 42 Am. R. 684; New England Express Co. v. Maine, etc., R. Co., 57 Me. 188; Dinsmore v. Louisville, etc., R. Co., 2 Fed. R. 465.

<sup>2</sup>We are not here concerned with the question of discrimination as defined by statutes either state or national but are treating of the common law doctrine. We have elsewhere discussed the question of the effect of statutes regulating the subject of discrimination by carriers.

reasonable terms for them. Respecting preference in rates of compensation, his obligation is to charge no more than a fair return in each particular transaction, and except as thus restricted he is free to discriminate at pleasure."<sup>1</sup> The doctrine asserted in the opinion from which we have quoted states the rule recognized by the great weight of authority.<sup>2</sup>

§ 1468. Discrimination—Like facilities to be furnished to all where like conditions exist.—It is, we think, safe to say that the rule is that a railroad carrier, so far as concerns the receipt and transportation of goods, however it may be as to

<sup>1</sup>Per Wallace, J. in *Menacho v. Ward*, 27 Fed. R. 529, quoted with approval in *Lough v. Outerbridge*, 143 N. Y. 271, s. c. 42 Am. St. R. 712. See, also, *Evershed v. London, etc., R. Co.*, L. R. 3 Q. B. D. 134; *Cleveland, etc., R. Co. v. Closser*, 126 Ind. 348, 26 N. E. R. 159, and cases cited. See, also, cases cited in the next note. The question is ably discussed in *Interstate Commerce Com. v. Baltimore, etc., R. Co.*, 43 Fed. R. 37. It is true that the court in the case referred to was dealing with the Interstate Commerce Act, but the reasoning upon the question as to what constitutes an unjust discrimination applies to cases arising under the common law rule. It is held in the case under immediate mention that the burden of proving unjust discrimination is on the shipper, citing on that point, *Denaby, etc., Co. v. Manchester, etc., R. Co.*, L. R. 11 App. Cas. 97.

<sup>2</sup>In a text book of great merit the subject is well discussed and it was said: "The cases contain many statements which seem to be in conflict, yet, except where the question is not influenced by local statutes it is believed that all the cases are in substantial harmony in reference to the vital principles involved. At the founda-

tion of the whole matter lies the common law rule that in each particular case there shall be a reasonable compensation and no more." *Hutchinson on Carriers*, § 302. See *Cleveland, etc., R. Co. v. Closser*, 126 Ind. 348, s. c. 26 N. E. R. 159; *Nicholson v. Great Western, etc., R. Co.*, 7 C. B. (N. S.) 755; *Hozier v. Caledonian, etc., R. Co.*, 1 Nev. & McN. R. Cas. 27; *Stewart v. Lehigh, etc., R. Co.*, 38 N. J. Law 505 (explaining *Messenger v. Pennsylvania R. Co.*, 36 N. J. Law 407); *Great Western, etc., R. Co. v. Sutton*, 4 L. R. H. L. 226; *Ransome v. Eastern, etc., R. Co.*, 1 C. B. (N. S.) 437; *Jones v. Eastern, etc., R. Co.*, 1 Nev. & McN. R. Cas. 45; *Oxlade v. North Eastern R. Co.*, 1 Nev. & McN. R. Cas. 72; *Baxendale v. Great Western Ry. Co.*, 5 C. B. (N. S.) 336; *Bellsdyke v. North British, etc., R. Co.*, 2 Nev. & McN. R. Cas. 105; *Spofford v. Boston, etc., R. Co.*, 128 Mass. 326; *Johnson v. Pensacola, etc., R. Co.*, 16 Fla. 623, s. c. 26 Am. R. 731; *Hersh v. Northern, etc., R. Co.*, 74 Pa. St. 181; *Christie v. Missouri Pac. R. Co.*, 94 Mo. 453; *Chicago, etc., R. Co. v. People*, 67 Ill. 1; *Union Pacific R. Co. v. United States*, 117 U. S. 355; *Hays v. Pennsylvania Co.*, 12 Fed. R. 309.

rates of freight, must, where the conditions and circumstances are identical, treat all shippers alike.<sup>1</sup> It can not furnish facilities to some shippers and deny them to other shippers unless there is a difference in conditions or circumstances such as makes the discrimination a just one. Public policy forbids that common carriers should be permitted to favor one shipper or one class of shippers in discharging the general duty to accept and carry goods, to the prejudice of others. The reasons upon which rest the cases holding that a difference may be made in the rates charged shippers do not fully apply to the duty to carry goods duly offered for transportation.

§ 1469. **Discrimination—Effect on stipulations limiting liability.**—In cases where a railroad carrier discriminates against a shipper by giving others preference in the time, mode or rapidity of transportation there is reason for affirming that if loss results from such discrimination the carrier will lose the benefit of contract stipulations limiting its liability and will be held to accountability as an insurer. The wrong on its part in such cases is such as to justify the courts in holding that it can derive no benefit from the contract, since such a wrong is practically a repudiation of the contract. At all events, there is such a default on its part as requires the conclusion that it can not hold the other party bound by the contract. If the contract is in part abandoned, disavowed or rendered ineffective by the wrongful acts of the carrier it

<sup>1</sup> *Fish v. Chapman*, 2 Ga. 349, s. c. 46 Am. Dec. 393; *Ballentine v. North Missouri R. Co.*, 40 Mo. 491, s. c. 93 Am. Dec. 315; *Houston, etc., R. Co. v. Smith*, 63 Tex. 322; *Sandford v. Railroad Co.*, 24 Pa. St. 378; *Great Western, etc., R. Co. v. Burns*, 60 Ill. 284; *Bennett v. Dutton*, 10 N. H. 481. See *Crouch v. London, etc., R. Co.*, 23 L. J. C. P. 73; *Crouch v. Great Northern, etc., R. Co.*, 11 Exch. 742; *Union, etc., R. Co. v. Goodridge*, 149 U. S. 680; *Keeney v. Grand Trunk, etc., R. Co.*, 47 N. Y. 525; *Chicago, etc., R. Co. v. Suffern*, 129 Ill. 274, s. c. 21 N. E. R. 824; *International, etc., Co. v. Grand Trunk R. Co.*, 81 Me. 92; *Galena, etc., R. Co. v. Rae*, 18 Ill. 488, s. c. 68 Am. Dec. 574; *Middleton v. Fowler*, 1 Salk. 282; *Boson v. Sandford*, 2 Salk. 440; *Hoover v. Pennsylvania Co.*, 156 Pa. St. 220, s. c. 36 Am. St. R. 43; *Avinger v. South Carolina R. Co.*, 29 S. Car. 265, s. c. 13 Am. St. R. 716. See cases cited in Mr. Freeman's note to *Root v. Long Island, etc., R. Co.*, 114 N. Y. 300, 11 Am. St. R. 643, 647.

can not justly take advantage of any of its stipulations. Our conclusion is, as we believe, supported by principle and it has support from authority.<sup>1</sup> An undue preference of the character mentioned is an actionable wrong and will constitute the basis of a cause of action for damages, and this being true the carrier violates both the law and its contract, for the law as a factor enters into the contract and the duty to act with impartiality, and, under like conditions and circumstances, treat all shippers alike is prescribed by law, so that, the wrong doing carrier is not in a situation to invoke judicial assistance to enable it to escape liability under the contract stipulations limiting its liability. But where there is nothing more than an undue preference in the matter of the rates of freight the principles we have stated can not apply, for, while such a wrong may give a right of action for damages, it can not be justly said to contribute to the loss, or, indeed, to have causal connection, proximate or remote, with the injury.

**§ 1470. Duty to furnish cars.**—It is the duty of a railroad company to provide facilities for the transportation of goods, but this duty is not an absolute one. The company must furnish cars sufficient to transport goods, offered in the usual and ordinary course of business, but it is not bound to anticipate and prepare for an unexpected press of business. It is under an obligation to keep for use such rolling stock as the requirements of ordinary business make necessary, but is not under a duty to keep extra rolling stock to meet extraordinary or unprecedented requirements.<sup>2</sup> A plaintiff who seeks to recover against a railroad company for a failure to furnish cars must aver and prove that the goods were properly offered for transportation.<sup>3</sup>

<sup>1</sup> *Keeney v. Grand Trunk, etc., R. Co.*, 47 N. Y. 525; *Hutchinson on Carriers*, (2nd ed.) § 280 *a*.

<sup>2</sup> *Louisville, etc., R. Co. v. Queen City, etc., Co.*, (Ky.) 35 S. W. R. 626, citing *Houston, etc., Ry. Co. v. Smith*, 63 Tex. 322; *Thayer v. Burchard*, 99

Mass. 508; *Hutchinson on Carriers*, § 292; *Lawson's Rights and Remedies*, § 1804. See, also, *Fordyce v. Nix*, 58 Ark. 136, s. c. 23 S. W. R. 967.

<sup>3</sup> *Little Rock, etc., R. Co. v. Conatser*, (Ark.) 33 S. W. R. 1057.

**§ 1471. Refusal to carry—Duty to state grounds of refusal.—**

It is held to be the duty of a railroad company when goods of the kind it carries are properly offered to it for transportation to state the grounds upon which it refuses to receive them.<sup>1</sup> Where the right to refuse depends upon specific grounds, and the grounds upon which the refusal is based are stated the carrier can not successfully defend on other grounds.<sup>2</sup> So where specific grounds are not stated but there is a general refusal the carrier can not justify his refusal unless there was a general right to refuse.<sup>3</sup>

**§ 1472. Duty of carriers as to cars and equipments—Standard of.**—The standard of duty by which the acts of a railroad carrier are to be measured is not easily defined, but the question as to what constitutes the standard is in many cases the controlling one. Where there is a contract limiting the liability of the carrier the question, as we have indicated, is whether there was or was not negligence, and whether there was or was not negligence depends to a great degree upon the nature and extent of the carrier's duty. Some of the cases lay down a very stringent rule. Thus, in one of them it was said, in speaking of the vehicle used by the carrier, that: "It must be perfect in all its parts, in default of which he (the carrier) becomes responsible for any loss that occurs in consequence of the defect or to which it contributes,"<sup>4</sup> but this is a stronger statement than principle or authority justifies except, of course, where the carrier is an insurer. It is no doubt true that the standard of duty is a high one but we do not believe that, where the question is as to whether there was negligence, it is so high as to require that the means and facilities employed by the carrier should be perfect in all their parts. It has been held that the

<sup>1</sup> *Railway Co. v. McCarthy*, 96 U. S. 258, approved in *Davis v. Wakelee*, 156 U. S. 680, s. c. 15 Sup. Ct. R. 555.

<sup>2</sup> *Hannibal, etc., R. Co. v. Swift*, 12 Wall. 262.

<sup>3</sup> We think the statement in the text is supported by the principle that a party who is duly requested to per-

form a duty must assign reasons for his refusal or he can not rely upon specific grounds as excusing his refusal. *Hanna v. Phelps*, 7 Ind. 21; *Vinton v. Baldwin*, 95 Ind. 433.

<sup>4</sup> *Empire, etc., Co. v. Wamsutta Co.*, 63 Pa. St. 14, s. c. 3 Am. R. 515.

rule of law is that the carrier is guilty of negligence if it has not adopted "the most approved modes of construction and machinery in known use in the business and the best precautions in known practical use for securing safety," but it is "not bound to use every possible prevention which the highest scientific skill might have suggested, nor to adopt an untried machine or mode of construction."<sup>1</sup> The case to which we have referred states the rule quite as strongly as principle warrants. It may, indeed, be doubted whether it does not state the rule too strongly. We should be inclined to doubt whether a railroad carrier of goods is in all cases bound to adopt the most approved machinery and appliances, since such a rule would require it to discard machinery and appliances because better had been invented or discovered, although those which it had in use were safe and adapted to the purposes for which it was intended to be used. We do not say that it may not be the duty of the carrier to exercise the highest degree of practicable care, but we doubt whether that degree of care invariably requires it to discard appliances in use and procure newer ones in order that it may have "the most approved."

§ 1473. **Express contract to furnish cars.**—Where a railroad company expressly undertakes by special contract to furnish cars at a specified time, it is bound to perform its contract. Where there is no express contract, then, as we have seen, an unusual press of business may excuse the company for a failure to furnish cars, but where there is an express contract the rule is that a press of business, although unusual and unexpected, will not relieve the company from liability.<sup>2</sup> Where there is an express contract, of the character above indicated, to furnish cars at a specified time, the fact that an unavoidable accident prevents the company from performing its contract,

<sup>1</sup> *Steinweg v. Erie, etc., R. Co.*, 43 N. Y. 123, s. c. 3 Am. R. 673, citing *Ford v. London, etc., R. Co.*, 2 Foster & Fin. N. P. 730; *Hegeman v. Western, etc., R. Co.*, 13 N. Y. 9; *Field v. New York, etc., R. Co.*, 32 N. Y. 339.

See, generally, *Illinois Cent. R. Co. v. Hall*, 58 Ill. 409; *Sloan v. St. Louis, etc., R. Co.*, 58 Mo. 220.

<sup>2</sup> *Gulf, etc., R. Co. v. Hume*, 6 Tex. Civ. App. 653.

will not exonerate it from liability to a shipper who suffers an injury because of the failure to perform the contract.<sup>1</sup>

§ 1474. **Goods requiring unusual facilities—Refrigerator cars.**—As we have elsewhere said a railroad carrier is not, as we believe, bound to make provision for carrying articles of an unusual character requiring for their carriage, cars or appliances of a peculiar and unusual construction. This principle, as it seems to us, requires the conclusion that a railroad carrier is not bound to accept for transportation articles such as can only be safely carried in refrigerator cars unless it holds itself out as a carrier of that kind or class of property, or because of the general usages of the locality or the general character of the course of business at the termini or points upon the line it can be justly held that there is an implied general duty to provide facilities for safely transporting and caring for that class of property. If, however, the company holds itself out as a carrier of that kind of property and undertakes to transport it, there is a duty to provide such cars and appliances as will secure the safety of the property.<sup>2</sup> In one of the cases it was held that where the company contracted to transport fruit in refrigerator cars it was bound to procure such cars although it had none of its own and for an unreasonable delay

<sup>1</sup> *Shubrick v. Salmond*, 3 Burr. 1637. The case of *Newport, etc., R. Co. v. Mercer*, 96 Ky. 475, 29 S. W. R. 301, lays down a different doctrine from that stated in the text, but, with entire respect for the learned court, we venture to affirm that the rule is correctly stated in the text, for a carrier who contracts absolutely to do a given thing at a specified time, assumes the risks from accidents. *Blight v. Page*, 3 Bosanquet & P. 295, note; *Barker v. Hodgson*, 3 M. & S. 267; *Paradine v. Jane*, Aley 26; *Beebe v. Johnson*, 19 Wend. 500; *Touteng v. Hubbard*, 3 Bosanquet & P. 291; *Medeiros v. Hill*, 8 Bing. 231; *Osgood v. Groning*, 2 Campl. 466; *Lorillard v. Palmer*, 15

*John*. 14; *Scott v. Libby*, 2 John. 336; *The Harriman*, 9 Wall. 161; *Beatson v. Schank*, 3 East. 233; *Barret v. Dut-ton*, 4 Campl. 333; *Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491; *Harmony v. Bingham*, 1 Duer. (N. Y.) 209; *Collier v. Swinney*, 16 Mo. 484; *Tirrell v. Gage*, 4 Allen, 245; *Place v. Union, etc., Co.*, 2 Hilt. (N. Y.) 19.

<sup>2</sup> *Beard v. Illinois Cent. R. Co.*, 97 Iowa 518, s. c. 7 L. R. A. 280, citing *Hewett v. Chicago, etc., R. Co.*, 63 Iowa 611; *Sager v. Portsmouth, etc., R. Co.*, 31 Me. 228; *Great Western R. Co. v. Hawkins*, 18 Mich. 427; *Rail-road Co. v. Pratt*, 22 Wall. 123; *Wing v. New York, etc., R. Co.*, 1 Hilt (N. Y.) 235.



in procuring such cars was liable for the damages caused by the delay.<sup>1</sup> There is, it is obvious, a clear distinction between cases where a railroad carrier is sought to be held responsible for a refusal to receive and carry goods and a case where it undertakes to carry them. If the goods are such as it does not undertake to carry and is not prepared to transport, and such as require cars and appliances of a peculiar and unusual kind, then, as we believe, it may rightfully refuse to accept them for transportation, but if it does receive them for transportation it is liable for damages if injury results because of the insufficiency or unsuitableness of its cars or equipments.<sup>2</sup> Some of the cases contain loose expressions indicating that cars and equipments must be provided that will safely transport any kind of property but these expressions when considered, as they must be, as addressed to the facts of the particular case in which they were used can not be justly held to lay it down as a general rule that railroad carriers are bound to provide cars and equipments that will safely carry all kinds of property. It is doubtless true that custom and usage exert an important influence upon the question of the duty of a railroad carrier to provide itself with suitable, safe and proper cars and equipments for carrying property of a perishable nature or property which requires for its preservation peculiar means and methods, and it is probably true that where a railroad company accepts a charter to operate a road in a locality where the business involves the transportation of goods from points and markets where perishable fruit and the like are the ordinary and usual commodities of commerce, there is an implied duty to provide itself with suitable and proper cars and equipments for the transportation of that kind of property, but where such property is an extraordinary commodity, where there is no general undertaking to carry that kind of property and no contract to carry it, we believe there is no duty to provide cars and equipments of a peculiar and unusual kind designed and

<sup>1</sup> *International, etc., R. Co. v. Young*, (Tex. Civ. App.) 28 S. W. R. 819.      <sup>2</sup> *Udell v. Illinois Cent. R. Co.*, 13 Mo. App. 254; *Wetzell v. Chicago, etc., R. Co.*, 12 Mo. App. 599, note.

required only for the transportation of that peculiar class of property.

§ 1475. **Acceptance of perishable property — Cars and equipments.**—As suggested in a preceding section, we think there is a distinction between cases where a railroad carrier accepts goods requiring cars and equipments of an unusual and peculiar character for their transportation, and requiring for their preservation from injury care different in degree and kind from that required in the carriage of ordinary commodities and cases where it refuses to accept that kind of property. A railroad carrier that accepts for transportation goods of a perishable nature, which require cars and equipments of a peculiar kind, undertakes, in the absence of some fact changing the nature of the undertaking, that it has such cars and equipments, and that it will properly use them in the transportation of such property. In such a case it is no defense that the carrier did not own or control such cars or equipments, for by accepting the property, with notice, express or implied, of its character, the carrier is precluded from asserting that it did not have the means or facilities for performing the duty it took upon itself.<sup>1</sup> If the carrier gives notice that it has no cars and equipments of the kind required, and, by contract with the owner or consignor, it is agreed that the goods shall be transported in ordinary cars, then the carrier can not, as we believe, be held liable simply on the ground that it did not provide cars and equipments peculiarly adapted to the carriage of goods of the unusual kind entrusted to it for transportation under the contract. The principle upon which rests the rule that a railroad carrier that accepts goods requiring peculiar cars, equipments and care, must furnish such cars and

<sup>1</sup> *Beard v. Illinois Cent. R. Co.*, 79 Iowa 518, s. c. 7 L. R. A. 280; *Hannibal, etc., R. Co. v. Swift*, 12 Wall. 262; *Helliwell v. Grand Trunk, etc., R. Co.*, 7 Fed. R. 68; *Paramore v. Western R. Co.*, 53 Ga. 383; *Boscowitz v. Adams, etc., Co.*, 93 Ill. 525; *Steinweg v. Erie R. Co.*, 43 N. Y. 123; *Hewett v. Chicago, etc., R. Co.*, 63 Iowa 611; *Hawkins v. Great Western, etc., R. Co.*, 17 Mich. 57; *Great Western, etc., R. Co. v. Hawkins*, 18 Mich. 427; *Railroad Co. v. Pratt*, 22 Wall. 123; *Wing v. New York, etc., R. Co.*, 1 Hilt. (N. Y.) 235; *Merchants', etc., Co. v. Cornforth*, 3 Colo. 280.

equipments and exercise such care, authorizes the conclusion that where such carrier agrees to transport goods in a refrigerator car it impliedly undertakes to exercise such care and diligence as that class of goods requires, although the care and diligence required is greater than that required in the transportation of ordinary commodities.<sup>1</sup>

§ 1476. **Failure to furnish cars—Offer of goods.**—A plaintiff who demands damages of a railroad company for a failure to furnish cars must show an offer to bring himself into contractual relations with the carrier.<sup>2</sup> Where cars are required there must be a reasonable demand and an offer of goods for transportation.<sup>3</sup> A party who has no goods for transportation can not hold the carrier liable for a failure to furnish cars.<sup>4</sup> There is, it is obvious, an essential difference between the case of the demand upon a railroad company to furnish cars for the transportation of articles of commerce by the car load, and the case of a demand upon a carrier to transport articles in small quantities. It may, with propriety, be held that the carrier which holds itself out as such must be prepared to receive and transport small quantities of goods upon demand, but such a doctrine can not be justly applied where the shipper requires cars. Where cars are required by the shipper reasonable notice should be given by him and a reasonable time allowed the company in which to procure the cars. It can not be expected that a railroad company will always have cars at a designated place for the transportation of goods in car load lots

<sup>1</sup> Chicago, etc., R. Co. v. Davis, 159 Ill. 53, 42 N. E. R. 382, affirming Chicago, etc., R. Co. v. Davis, 54 Ill. App. 130, and citing St. Louis, etc., R. Co. v. Dorman, 72 Ill. 504; Indianapolis, etc., R. Co. v. Strain, 81 Ill. 504.

<sup>2</sup> Little Rock, etc., R. Co. v. Conatser, (Ark.) 33 S. W. R. 1057.

<sup>3</sup> Ayres v. Chicago, etc., R. Co., 71 Wis. 372; Richardson v. Chicago, etc., R. Co., 61 Wis. 596; Pittsburgh, etc.,

R. Co. v. Morton, 61 Ind. 539, 576; Louisville, etc., R. Co. v. Flanagan, 113 Ind. 488, 491; Louisville, etc., R. Co. v. Godman, 104 Ind. 490; Pittsburgh, etc., R. Co. v. Racer, 5 Ind. App. 209.

<sup>4</sup> Wilder v. St. Johnsbury, etc., R. Co., 66 Vt. 636, s. c. 30 Atl. R. 141. See Missouri, etc., R. Co. v. Texas, etc., R. Co., 31 Fed. R. 864.

and hence it is incumbent upon a shipper to give reasonable notice that cars are required. There may be cases where usage and custom may change the rule, but where there is no usage or custom, we think it safe to say that reasonable notice that cars are wanted must always be given so that they may be furnished.

§ 1477. **Cars—Inability to furnish—Burden on carrier to prove an excuse for failure to furnish.**—As the general rule of law requires a railroad carrier to furnish cars for the transportation of the kind of goods it undertakes to carry, and as the facts constituting an excuse for a failure to furnish them when a proper request is made and freight is offered are peculiarly within the knowledge of the carrier, it logically follows that the burden is on the carrier to establish the facts constituting an excuse for the failure to furnish cars.<sup>1</sup> We think that the burden is on the plaintiff to show a proper offer of goods and a request to carry, but that the burden of explaining or excusing a failure to comply with such request is on the carrier. While it is incumbent on the plaintiff to prove such facts, circumstances or conditions as show a duty and the failure or refusal to perform it, he need not go farther and prove that there was no excuse for a failure to do what it was the duty of the defendant under the facts and circumstances to do. Where a tender of charges is essential to impose upon a railroad company the duty to carry, a tender must be shown or an excuse for not making it be proved, but we do not here consider the question as to whether a tender of charges is always necessary.<sup>2</sup>

§ 1478. **Duty of carrier as to cars and equipments—Influence of breach of duty on contracts limiting liability.**—A railroad carrier being an insurer of the goods entrusted to it for transportation must, for its own protection, provide and prop-

<sup>1</sup> *Ayres v. Chicago, etc., R. Co.*, 71 Wis. 372.

<sup>2</sup> Upon the subject of tender of charges, see *Wyld v. Pickford*, 8 M. & W. 443; *Batson v. Donovan*, 4 B. &

Ald. 21; *Knight v. Providence, etc., R. Co.*, 13 R. I. 572, s. c. 9 Am. & Eng. R. Cas. 90; 1 Greenleaf's Ev. 210, n. 6; *Carr v. Lancashire, etc., Railway*, 7 Exch. 707.

erly use cars, equipments and machinery adapted to the carriage of goods of the kind it undertakes to carry. In cases where there is no contract limiting its liability it is not important to the owner, so far as concerns the right to recover for injury to the goods, whether the cars and equipments are suitable and safe or not, for, as indicated, if there be no contract limiting the carrier's liability it is liable at all events, except for injuries caused by the act of God or public enemies, or the other causes which exonerate carriers, and the question whether there was or not negligence on its part is not material, but where there is such a contract the question of negligence or no negligence is one of importance insomuch as the negligence of the carrier in regard to cars, equipments and appliances or the use and handling of them will render contract stipulations limiting the liability ineffective as a protection from liability. Whether there was or was not negligence depends upon the answer to the question whether there was or was not a breach of duty, so that it is important to ascertain what the duty of the carrier is and whether it was performed. It may be said that the general rule is that the carrier is under a duty to properly equip its trains in all respects for the proper and safe transportation of goods of the kind it undertakes to carry and that the failure to perform this duty is negligence and will render unavailing stipulations in a contract limiting its liability as a common carrier.<sup>1</sup> The duty to provide suitable and safe cars and

<sup>1</sup>*Hoosier Stone Co. v. Louisville, etc., R. Co.*, 131 Ind. 575; *Coupland v. Housatonic, etc., R. Co.*, 61 Conn. 531, s. c. 15 L. R. A. 534; *New Jersey, etc., Co. v. Merchants' Bank*, 6 How. (U. S.) 344; *Levering v. Union, etc., Co.*, 42 Mo. 88; *Empire, etc., Co. v. Wamsutta, etc., Co.*, 63 Pa. St. 14; *Helliwell v. Grand Trunk, etc., R. Co.*, 7 Fed. R. 68; *Paramore v. Western, etc., R. Co.*, 53 Ga. 383; *Insurance Co. v. St. Louis, etc., R. Co.*, 3 McCrary 233; *York v. Central R. Co.*, 3 Wall. 107, 113; *Bissell v. New York, etc., R. Co.*, 25 N. Y. 442; *Ford v. London, etc., R. Co.*, 2 Fost. & Fin. N. P. 730; *Merchants', etc., Co. v. Cornforth*, 3 Colo. 280; *Boscowitz v. Adams, etc., Co.*, 93 Ill. 523, s. c. 34 Am. R. 191; *Lyon v. Mells*, 5 East 428; *Shaw v. York, etc., R. Co.*, 13 Q. B. 347; *Combe v. London, etc., R. Co.*, 31 L. T. R. (N. S.) 613; *Ayres v. Chicago, etc., R. Co.*, 71 Wis. 372, s. c. 5 Am. St. R. 226; *Wallingford v. Columbia, etc., R. Co.*, 26 S. Car. 258; *Hamilton v. Western, etc., R. Co.*, 96 N. Car. 398; *Leonard v. Fitchburg R.*

equipments extends to all appliances and machinery used in operating railroad trains, such as brakes, engines and the like, and the term "cars and equipments" as used by us is to be understood as meaning all appliances of every kind and description used in loading, operating, managing and moving trains. The general rule where there is no special contract is that if there is a want of due care and diligence in procuring, keeping in repair, or in using any appliance, no matter what its office or character, there is liability. Many of the cases cited in the note directly support this conclusion and the principle upon which all the adjudged cases unite sustain it. Care must be exercised to provide such cars and equipments as will protect the goods accepted for carriage from injury by the elements, as from cold, heat and the like, and regard must be had to the nature of the article accepted for transportation, the season and matters of a similar character.<sup>1</sup> It is obvious that whether there was or was not negligence in the particular instance is often a question for the jury, as the existence or non-existence of negligence must often depend upon the conditions and circumstances of the special case.

### § 1479. Facilities for transportation—Yards—Depots.—

In another place we have treated of the duty to establish stations, and at this place shall treat of the subject of providing stations only in so far as it relates to the general duty of railroad carriers of things to furnish facilities for the transportation of goods of the kind they undertake to carry. Under the rule

Co., 143 Mass. 307; *Hart v. Allen*, 2 Watts 114; *New Jersey, etc., R. Co. v. Kennard*, 21 Pa. St. 203; *Smith v. New Haven, etc., R. Co.*, 12 Allen 531, s. c. 90 Am. Dec. 166; *Railroad Co. v. Pratt*, 22 Wall. 123; *Pratt v. Ogdensburg, etc., R. Co.*, 102 Mass. 557. See, generally, *Chicago, etc., R. Co. v. Suffern*, 129 Ill. 274, s. c. 27 Ill. App. 404; *Costello v. Syracuse, etc., R. Co.*, 65 Barb. 92; *Illinois, etc., R. Co. v. Baches*, 55 Ill. 379; *Welsh v. Pittsburg, etc., R. Co.*, 10 Ohio St. 65, s. c. 75 Am. Dec. 490; *Rice v. Western, etc., R. Co.*, 3 Inters. Com. R. 162; *Scofield v. Lake Shore, etc., R. Co.*, 2 Inters. Com. R. 67.

<sup>1</sup> *Beard v. Illinois Cent. R. Co.*, 79 Iowa 518, s. c. 7 L. R. A. 280; *Levering v. Union, etc., Co.*, 42 Mo. 88, s. c. 97 Am. Dec. 320; *Insurance Co. v. St. Louis, etc., R. Co.*, 3 McCrary 233; *Mason v. Missouri, etc., R. Co.*, 25 Mo. App. 473.

that it is the duty of railroad companies to duly provide and properly use facilities for the transportation of goods, it is held to be under an obligation to furnish what has been called "stational facilities."<sup>1</sup> This duty does not extend so far as to require a railroad company to provide warehouses for the storage of goods to be transported at some future time, since the duty of a railroad company in its capacity of a common carrier is to accept and transport goods tendered it for transportation, and not to take charge of goods intended for transportation at a future day, but not offered for the purpose of transportation. The rule which excuses a carrier from transporting in cases where an extraordinary press of business<sup>2</sup> has exhausted its facilities, excuses it, as we believe, for a failure to provide facilities for receiving and taking care of an extraordinary quantity of goods, although offered for transportation. Whether depots,<sup>3</sup> station buildings, yards, pens, chutes or the like are sufficient must, it is evident, depend in a great measure upon the demands of traffic at the place where they are located, the custom and usage of business, and matters of a similar nature, for it is clear that facilities sufficient in one locality and under some circumstances might not be sufficient in other localities and under different circumstances and conditions. The question of the sufficiency of such facilities must often be largely one of fact, since it can not always be determined without a consideration of surrounding circumstances; but when there is no controversy as to the facts, or the facts

<sup>1</sup> *Covington, etc., R. Co. v. Keith*, 139 U. S. 128, s. c. 11 Sup. Ct. R. 461. In the case cited it was said: "In respect to the mere loading and unloading of live stock, it is only required to furnish such facilities as are reasonably sufficient." We suppose that the general rule is that station buildings, depots, yards and the like must be reasonably sufficient, and that the company is not bound to use extraordinary efforts to provide facilities that

will meet all demands, but that they must be such as will meet the ordinary requirements of traffic at the place where they are located. See *McCullough v. Wabash, etc., R. Co.*, 34 Mo. App. 23; *Mason v. Missouri Pac. R. Co.*, 25 Mo. App. 473.

<sup>2</sup> *Ante*, § 1465, p. 2282.

<sup>3</sup> As to what is a depot, see *Maghee v. Camden, etc.*, 45 N. Y. 514, 520, s. c. 6 Am. R. 124; *St. Louis, etc., R. Co. v. State*, (Ark.) 31 S. W. R. 570.

are within the judicial knowledge, then the question, as we conceive, is one of law, for it can not be that the question can depend upon the views of this or that jury.

§ 1480. **Selection of cars by shipper.**—The rule holding railroad carriers bound to furnish cars adapted to the goods they undertake to transport does not apply where the shipper with means and opportunities of knowledge voluntarily selects the car on which he desires his property transported. The carrier is not responsible in such a case for damages resulting from the unsuitableness of the car. If, however, the carrier fails to disclose defects which it was his duty to reveal it will be responsible for injuries to the goods,<sup>1</sup> attributable to such defects. There is no violation of principle in holding that where the shipper exercises his own judgment, is not deceived or misled by the carrier, and chooses a car for the transportation of his property, the carrier is not answerable for the sufficiency of the car, for in such a case he does not trust to the carrier nor rely upon the duty of the carrier but, on the contrary, freely exercises his right of choice and relies entirely upon his own judgment, so that there is no reason for affirming that the carrier was guilty of any wrong.<sup>2</sup> But it is held that the mere fact that the shipper has knowledge of defects in cars or equipments will not absolve the carrier from liability.<sup>3</sup> There is, it is obvious, an essential difference between a case where the shipper with opportunities and means of knowledge selects a car not adapted to or suitable for the transportation of his goods and injury results solely because of the unsuitableness of the car, and cases where the car is defective and the loss is caused by the defect, since the shipper may justly be regarded as competent to determine for himself whether the car is adapted to the use which he desires made of it, but where there are hidden defects known to the carrier which cause the injury the shipper

<sup>1</sup> *Carr v. Schafer*, 15 Colo. 48, s. c. 24 Pac. R. 873, (distinguishing *Merchants', etc., Co. v. Cornforth*, 3 Colo. 280).

<sup>2</sup> *Harris v. Northern, etc., R. Co.*, 20 N. Y. 232.

<sup>3</sup> *Railroad Co. v. Pratt*, 22 Wall. 123.



can hardly be said to assume the risks from such defects in the absence of a contract wherein he assumes such risks.

§ 1481. **Negligence—Handling goods.**—In a treatise of excellent and well deserved reputation the authors decline to treat negligence on the part of common carriers, saying that: "The obligations of common carriers are absolute and their liability does not depend upon their being negligent."<sup>1</sup> That the liability of common carriers is absolute is true in cases where there is no contract limiting their liability, for, as is well known, they are substantially insurers in such cases,<sup>2</sup> but, as elsewhere said, where there is such a contract the question of negligence is one of importance. If there is no such contract the railroad carrier is liable for the loss of goods entrusted to it in its capacity of a common carrier, no matter how great may be its care and diligence.<sup>3</sup> Unavoidable accidents, although they may be the cause of the loss, do not relieve the carrier from liability in cases where there is no limiting contract.<sup>4</sup> If, however, the term "unavoidable accident" or the term "inevitable accident" is to be taken as meaning an occurrence produced by the *vis major*, or, which results solely from what is called the act of God, then, under the settled rule heretofore discussed, it is correct to say that the carrier is not liable where the loss is caused solely by an "inevitable accident,"

<sup>1</sup> Shearm. & Redf. on Negligence, § 487.

<sup>2</sup> There is, of course, a difference between the obligation of a common carrier and that of an insurer who executes a policy of insurance. Lawson on Contracts of Carriers, § 2. But in a general sense the railroad carrier is an insurer because of the general nature of the duty imposed upon it by law.

<sup>3</sup> *Siordet v. Hall*, 4 Bing. 607; *Ewart v. Street*, 2 Bailey L. (S. Car.) 157; *McHenry v. Philadelphia, etc., Railroad Co.*, 4 Harr. (Del.) 448; *Merhon v. Holensack*, 22 N. J. Law 372; *Brous-*

*seau v. Ship Hudson*, 11 La. Ann. 427; *Plaisted v. Boston, etc., Co.*, 27 Me. 132.

<sup>4</sup> *Oakley v. Portsmouth, etc., Co.*, 11 Exch. 618; *Hyde v. Trent, etc., Co.*, 5 Tenn. R. 389; *Chicago, etc., R. Co. v. Sawyer*, 69 Ill. 285; *Merchants', etc., Co. v. Smith*, 76 Ill. 542; *Cox v. Peterson*, 30 Ala. 608; *Hayes v. Kennedy*, 41 Pa. St. 378; *Ladd v. Foster*, 31 Fed. R. 827; *The Morning Light*, 2 Wall. 560. In *Lipford v. Charlotte, etc., R. Co.*, 7 Rich. (S. Car.) 409, a distinction is made between loss resulting from negligence and loss due to the *vis major*.

but we think that there is a distinction between what are called inevitable accidents and occurrences resulting from the act of God, as storms, tempests, floods and the like.<sup>1</sup> In some of the cases, however, the term "inevitable accident" has been held to mean the same thing as the term "act of God."<sup>2</sup> It makes no difference how much care and diligence the carrier may exercise nor what may be the cause of the loss,<sup>3</sup> the carrier is liable where there is no effective protecting contract stipulation, except, of course, where the loss is due to some one of the causes which the law declares shall exonerate the carrier, or is caused by the fault of the shipper or the inherent qualities of the goods. Against loss from decay due to the inherent character of the goods the carrier does not undertake to protect the owner,<sup>4</sup> and, of course, as there is no duty in that regard there can be no negligence, but if the want of proper care and diligence in handling the goods causes the loss there may be negligence and consequent liability. So, upon the same principle, the carrier is not necessarily liable for injury from leakage, fermentation, evaporation or the like where it is due to the inherent nature of the goods or to the conduct of the owner or shipper in preparing them for transportation.<sup>5</sup> The statement in a bill of lading that goods were in good condition when

<sup>1</sup> *Hale v. New Jersey, etc., Co.*, 15 Conn. 539, s. c. 39 Am. Dec. 398; *Central, etc., Boats v. Lowe*, 50 Ga. 509; *Gordon v. Buchanan*, 5 Yerg. (Tenn.) 79; *Trent, etc., Co. v. Wood*, 4 Dougl. 287, s. c. 26 Eng. C. L. 479; *Plaisted v. Boston, etc., Co.*, 27 Me. 132, s. c. 46 Am. Dec. 587; *Merritt v. Earle*, 29 N. Y. 115, s. c. 86 Am. Dec. 292. See *Fergusson v. Brent*, 12 Md. 9, s. c. 71 Am. Dec. 582; *Polack v. Pioche*, 35 Cal. 416, s. c. 95 Am. Dec. 115.

<sup>2</sup> *Walpole v. Bridges*, 5 Blackf. (Ind.) 222; *Whitesides v. Thurlkill*, 12 Smed. & M. (Miss.) 599; *Neal v. Saunderson*, 2 Smed. & M. (Miss.) 572, s. c. 41 Am. Dec. 609. See *Engster v. West*, 35 La. Ann. 119, s. c. 48 Am. R. 232;

*Pittsburgh, etc., R. Co. v. Hollowell*, 65 Ind. 188, 194; *Tuckerman v. Stephens, etc., Co.*, 32 N. J. L. 320; *Crosby v. Fitch*, 12 Conn. 410, s. c. 31 Am. R. 745; 2 *Parsons on Cont.* (5th ed.) 145.

<sup>3</sup> It may not be amiss to bring to mind the fact that there is an essential difference between the liability of railroads as carriers of goods and as carriers of passengers.

<sup>4</sup> *Davidson v. Gwynne*, 12 East. 381.

<sup>5</sup> *Hudson v. Baxendale*, 27 L. J. Exch. 93; *Ohrloff v. Briscall*, 1 L. R. P. C. 231; *Hunnell v. Taber*, 2 *Sprague* (U. S. C. C.) 1. See *Tysen v. Moore*, 56 Barb. 412; *Cox v. London, etc., R. Co.*, 3 F. & F. 77; *Warden v. Greer*, 6 Watts 424; *Nelson v. Woodruff*, 1 Black (U. S.) 156; *Clark v. Barnwell*,

received for transportation is held to be a mere admission which may be contradicted, and hence does not conclude the carrier.<sup>1</sup> It is the duty of the carrier to exercise due care in loading or stowing the goods and a failure to exercise such care is actionable negligence,<sup>2</sup> but if the owner voluntarily takes it upon himself to load, with the right of free choice, and there is no act of the carrier misleading him, the carrier will not ordinarily be liable for an injury caused solely by the mode in which the goods were loaded. The carrier can not, however, compel a shipper to take upon himself a duty which the law requires the carrier to perform nor require the shipper to do that which is unreasonable.<sup>3</sup> It is, it may be said generally, the duty of the carrier to exercise such care and diligence in handling the goods as the law declares to be reasonable or ordinary care and diligence, and in order to determine what is ordinary or reasonable care and diligence it is necessary, as a general rule, to consider the facts and circumstances of the particular case, for while the generally accepted doctrine is that there are no degrees of negligence yet it is nevertheless true that what will constitute negligence under some circumstances and conditions may not constitute negligence under other circumstances and conditions.

12 How. 272; *Notara v. Henderson*, 5 L. R. Q. B. 346. As to the rule where the injury is due in part to fault in packing, see *Higginbotham v. Great Northern, etc.*, R. Co., 2 F. & F. 796; *Clarke v. Rochester, etc.*, R. Co., 14 N. Y. 570. See, generally, *Arend v. Liverpool, etc.*, R. Co., 64 Barb. 118; *Bradstreet v. Heran*, 2 Blatchf. 116; *Richards v. Doe*, 100 Mass. 524; *Keith v. Amende*, 1 Bush. 455; *Hazard v. Illinois, etc.*, R. Co., 67 Miss. 32, s. c. 7 So. R. 280; *McKinlay v. Morrish*, 21 How. 343; *Ship Howard v. Wissman*, 18 How. 231; *The Brig Collenberg*, 1 Black (U. S.) 170; *Brown v. Clayton*, 12 Ga. 564; *Howe v. Oswego, etc.*, R. Co., 56 Barb. 121.

<sup>1</sup> *Missouri, etc., R. Co. v. Fennell*, 79 Tex. 448, s. c. 15 S. W. R. 693. See *Missouri, etc., R. Co. v. Ivy*, 79 Tex. 444, s. c. 15 S. W. R. 692; *St. Louis, etc., R. Co. v. Knight*, 122 U. S. 79, 7 Sup. Ct. R. 1132; *Clark v. Barnwell*, 12 How. 272; *Cox v. Bruce*, L. R. 18 Q. B. D. 147; *Grant v. Norway*, 10 C. B. 665; *Miller v. Hannibal, etc.*, R. Co., 90 N. Y. 430. *Ante*, § 1421.

<sup>2</sup> *Hills v. Mackill*, 36 Fed. R. 702; *Baxter v. Leland*, 1 Blatchf. 526; *Levering v. Union, etc.*, R. Co., 42 Mo. 88, s. c. 97 Am. Dec. 320.

<sup>3</sup> *Joyner v. South Carolina, etc.*, R. Co., 26 So. Car. 49; *Rice v. Western, etc.*, R. Co., 3 Inters. Com. R. 162.

§ 1482. **Delay in transporting goods—General doctrine.**—A railroad carrier is liable for loss caused by unreasonable delay in transporting goods unless the delay is attributable to some cause which exonerates a common carrier from liability.<sup>1</sup> It is the duty of a carrier to deliver goods within a reasonable time as well as to safely transport them,<sup>2</sup> but the duty to prevent delay is of a different character from the duty to protect against loss by robbery or the like. It has been held that where the facilities of the carrier for transportation were sufficient for ordinary purposes and demands, but were not sufficient because of the extraordinary quantity of goods offered for shipment, no action will lie for damages attributable to the delay caused by the extraordinary quantity of goods requiring shipment.<sup>3</sup> Where a railroad company seeks to escape liability for loss caused by delay upon the ground that the freight charges have not been paid it is competent for the plaintiff to prove the value of the property as tending to show that it had ample security for the charges to which it was entitled.<sup>4</sup> The silence

<sup>1</sup> *Spence v. Norfolk, etc., R. Co.*, (Va.), 22 S. E. R. 815. See *Leonard v. Chicago, etc., R. Co.*, 54 Mo. App. 293; *Central, etc., R. Co. v. Georgia, etc., Co.*, 91 Ga. 389, s. c. 17 S. E. R. 904, 55 Am. & Eng. R. Cas. 606; *Alabama, etc., R. Co. v. Eichofer*, 100 Ala. 224, s. c. 14 So. R. 56; *Johnson v. East Tennessee, etc., R. Co.*, 90 Ga. 810, s. c. 17 S. E. R. 121.

<sup>2</sup> *Gates v. Chicago, etc., R. Co.*, 42 Neb. 379, s. c. 60 N. W. R. 583, 61 Am. & Eng. R. Cas. 218; *Michigan, etc., R. Co. v. Day*, 20 Ill. 375, s. c. 71 Am. Dec. 278; *Ohio, etc., R. Co. v. Dunbar*, 20 Ill. 623, s. c. 71 Am. Dec. 291; *Parsons v. Hardy*, 14 Wend. 215, s. c. 28 Am. Dec. 521; *Nettles v. South Carolina R. Co.*, 7 Rich. Law 190, s. c. 62 Am. Dec. 409; *Raphael v. Pickford*, 5 Man. & G. 551; *Illinois, etc., Co. v. Cobb*, 64 Ill. 128. See, also, *Davis v. Jacksonville, etc., R. Co.*, 126 Mo. 69, s. c. 28 S. W. R. 965; *Ruppel*

*v. Allegheny, etc., R. Co.*, 167 Pa. St. 166, s. c. 31 Atl. R. 478; *Wells, etc., Co. v. Fuller*, 4 Tex. Civ. App. 213, s. c. 23 S. W. R. 412; *Rathbone v. Neal*, 4 La. Ann. 563.

<sup>3</sup> *Bouker v. Long Island, etc., R. Co.*, 89 Hun 202, 35 N. Y. S. 23; *Pittsburgh, etc., R. Co. v. Racer*, 5 Ind. App. 209, s. c. 31 N. E. R. 853; *Galena, etc., R. Co. v. Rae*, 18 Ill. 486, s. c. 68 Am. Dec. 574, *Wibert v. New York, etc., R. Co.*, 19 Barb. 36. In *Smith v. Cleveland, etc., R. Co.*, 92 Ga. 539, s. c. 18 S. E. R. 977, it was held that where the delay of thirty-six hours was due to the crowded condition of the company's yard, which prevented an earlier delivery the company was not liable, but the facts in the case and the provisions of the bill of lading were somewhat peculiar so that it can not be justly considered as laying down a general rule.

<sup>4</sup> *Leach v. New York, etc., Co.*, 89

of the bill of lading as to the time of delivery is held not to preclude the plaintiff in an action for loss caused by delay from showing that the carrier had notice that the delay would be productive of unusual loss or injury.<sup>1</sup>

§ 1483. **Unreasonable delay—What constitutes—Evidence of.**—There is no fixed rule of law determining what will or will not constitute an unreasonable delay in all cases. The carrier is in all instances bound to use ordinary care and diligence to avoid unreasonable delay,<sup>2</sup> but many elements must be taken into consideration in determining whether there was or was not unreasonable delay in the particular instance. The fact that there was unusual delay does not always show a breach of duty. There may be cases where duty requires that a course should be pursued which will cause delay.<sup>3</sup> It is, indeed, the duty of the carrier to delay if delay be necessary to avoid the exposure of the goods to unusual danger.<sup>4</sup> In determining whether there was or was not unreasonable delay in transporting and delivering the goods it is proper to consider whether ordinary care and diligence were exercised in selecting the route, whether there was or was not an improper or unnecessary deviation from the route usually traversed, and like facts and circum-

Hun 377, 35 N. Y. S. 305. But it seems to us that the doctrine of the case cited requires limitation.

<sup>1</sup>Central, etc., Co. v. Savannah, etc., R. Co., 69 Fed. R. 683.

<sup>2</sup>Ruppel v. Allegheny, etc., R. Co., 167 Pa. St. 166, s. c. 31 Atl. R. 478.

<sup>3</sup>Crosby v. Fitch, 12 Conn. 410, s. c. 31 Am. Dec. 745; Davis v. Garrett, 6 Bing. 716. The principle which supports the cases holding that necessity may justify or excuse a deviation from the usual route sustains the doctrine stated in the text. Urquhart v. Barnard, 1 Taunt. 450; Reade v. Commercial Ins. Co., 3 Johns. 352, s. c. 3 Am. Dec. 495; Williams v. Grant, 1 Conn. 487 s. c. 7 Am. Dec. 235. We may note

in passing, although somewhat aside from the direct path, that the cases relating to carriage by vessels hold that the question whether there was or was not a deviation is one of law, to be determined by the court upon the facts proved. Suydam v. Marine, etc., Co., 2 Johns. 138; Graham v. Commercial, etc., Co., 11 Johns. 352; Jackson v. Betts, 9 Cow. 208; Newell v. Hoadly, 8 Conn. 381. But we think that the doctrine of the cases referred to can not be applied to railroad carriers in its full extent, but must be materially qualified and limited.

<sup>4</sup>Empire, etc., Co. v. Wallace, 68 Pa. St. 302.

stances.<sup>1</sup> The delay may be so great as to make it proper for the court to adjudge as matter of law, that it was unreasonable,<sup>2</sup> but, in accordance with the doctrine heretofore stated, the delay may be shown to have been a reasonable one under the facts and circumstances of the particular case. Where the delay is an unusual one and is not explained it is held to be *prima facie* evidence of negligence, but that in a case where there is only a slight delay the rule is different.<sup>3</sup>

§ 1484. Delay—Accidents and obstructions.—The rule in relation to liability for delays in the course of transportation is not so rigorous as that which governs in cases where goods are lost by theft, fraud, or the like.<sup>4</sup> A railroad carrier is not an insurer against the occurrence of delays and hence is not liable where the delay is attributable to misfortune or unavoidable accident.<sup>5</sup> Accidents which prevent the running of trains will, if not due to the fault of the carrier, excuse delay.<sup>6</sup> Where, however, the railroad carrier is guilty of negligence which causes the accident to which the delay is attributable it will be liable for the damages resulting from the delay.

§ 1485. Accidents do not terminate the duty of the carrier.—An accident may exonerate the carrier from loss resulting from

<sup>1</sup> Atlanta, etc., R. Co. v. Texas, etc., Co., 81 Ga. 602, s. c. 9 S. E. R. 600; Lowe v. East Tenn., etc., R. Co., 90 Ga. 85, s. c. 15 S. E. R. 692.

<sup>2</sup> Illinois Central R. Co. v. McClellan, 54 Ill. 58, s. c. 5 Am. R. 83.

<sup>3</sup> Mann v. Birchard, 40 Vt. 326; Davis v. Jacksonville, etc., R. Co., 126 Mo. 69, s. c. 28 S. W. R. 965; Dawson v. Chicago, etc., R. Co., 79 Mo. 296.

<sup>4</sup> Taylor v. Great Northern Railway Co., L. R. 1 C. P. 385; Philadelphia, etc., R. Co. v. Lehman, 56 Md. 209; Parsons v. Hardy, 14 Wend. 215, 28 Am. Dec. 521.

<sup>5</sup> Kinnick v. Chicago, etc., R. Co., 69 Iowa 665; Hughes v. Great West-

ern, etc., R. Co., 14 C. B. 637; Hales v. London, etc., Co., 4 Best & S. 66; Geismar v. Lake Shore, etc., R. Co., 102 N. Y. 563, s. c. 55 Am. R. 837, 26 Am. & Eng. R. Cas. 287; Wren v. Eastern, etc., R. Co., 1 L. T. R. (N. S.) 5; Wibert v. New York, etc., R. Co., 12 N. Y. 245; Nudd v. Wells, 11 Wis. 408.

<sup>6</sup> Vicksburg, etc., R. Co. v. Ragsdale, 46 Miss. 458; Ballentine v. North Missouri, etc., R. Co., 40 Mo. 491, s. c. 93 Am. Dec. 315; Conger v. Hudson River, etc., R. Co., 6 Duer (N. Y.) 375; Livingston v. New York, etc., R. Co., 5 Hun 562; Michigan, etc., R. Co. v. Burrows, 33 Mich. 6.

delay but an accident will not put an end to the carrier's duty. It is the duty of the carrier although delay may be caused by an accident to exercise reasonable care and diligence to transport the goods. The contract of carriage must, as a rule, be completed.<sup>1</sup> As soon as the impediment to the transportation is removed, or as soon as it can be overcome by the exercise of care and diligence the carrier must, without further delay, complete the carriage.<sup>2</sup>

§ 1486. **Care of goods during delay.**—The fact that an accident occurs which excuses delay does not relieve the carrier from the duty to exercise due care to protect the goods from loss or injury during the delay. The authorities require the conclusion that the carrier is at all times responsible for the safe keeping of property in its possession,<sup>3</sup> and that the happening of an accident does not relieve it from such responsibility. The carrier is under a duty to take reasonable precautions to preserve the goods from injury,<sup>4</sup> and for a breach of duty must respond in damages.

§ 1487. **Delay—Notice to the owner.**—Where the circumstances and conditions are such as cause an unusual delay in the transportation of goods, it is the duty of the carrier to give the consignor or owner notice of that fact. If the railroad carrier accepts the goods with knowledge that delays will occur and without informing the owner or consignor of that fact, it will be responsible for loss occasioned by the delay, although

<sup>1</sup> Hutchinson on Carriers, § 335, citing *Bowman v. Teall*, 23 Wend. 306; *Vickburg, etc., R. Co. v. Ragsdale*, 46 Miss. 458; *Bennett v. Byram*, 38 Miss. 17; *Lowe v. Moss*, 12 Ill. 477; *Evans v. Hutton*, 5 Scott N. R. 670.

<sup>2</sup> *Baltimore, etc., R. Co. v. O'Donnell*, 49 Ohio St. 489, s. c. 32 N. E. R. 476; *Hadley v. Clarke*, 8 T. R. 259.

<sup>3</sup> *King v. Shepherd*, 3 Story 349; *El-liott v. Rossell*, 10 Johns. 1, s. c. 6 Am. Dec. 306; *Propeller Niagara v. Cordes*, 21 How. (U. S.) 7; *Notara v. Henderson*, L. R. 5 Q. B. 346, s. c. L.

R. 7 Q. B. 225; *Chouteaux v. Leech*, 18 Pa. St. 224, s. c. 57 Am. Dec. 602; *Bird v. Cromwell*, 1 Mo. 81, s. c. 13 Am. Dec. 470; *Pearce v. The Thomas Newton*, 41 Fed. R. 106; *Swetland v. Boston, etc., R. Co.*, 102 Mass. 276.

<sup>4</sup> *Baltimore, etc., R. Co. v. Keedy*, 75 Md. 320, s. c. 23 Atl. R. 643, 49 Am. & Eng. R. Cas. 124. In the case cited it was held that where water was poured into a car of grain by a flood, the company was liable because it failed to remove the grain.

the delay may be caused by accident.<sup>1</sup> It is laid down by the text-writers that where the goods are delayed after acceptance for transportation, the owner should be notified of the delay with reasonable diligence.<sup>2</sup>

§ 1488. **Delay—Destruction of goods awaiting transportation by fire.**—A railroad company is not liable for the loss of goods destroyed by fire while in its warehouse awaiting transportation unless its negligence was the proximate cause of the loss, for the duty as a common carrier does not attach until it receives the goods in that capacity. It is generally held, however, that where goods are placed in a warehouse and the company undertakes to forward them but negligently delays to do so, it will be liable for the loss of the goods while in the warehouse awaiting transportation.<sup>3</sup> The basis of the liability in such a case is held to be negligence in failing to forward the goods without delay. The company can not, however, be liable unless there was negligence on its part.<sup>4</sup> There is some difficulty in supporting the doctrine that it is liable because of the delay inasmuch as there is reason for affirming that the delay can not be justly said to be the proximate cause of the loss of the goods.<sup>5</sup> The cases

<sup>1</sup> *Helliwell v. Grand Trunk, etc., R. Co.*, 7 Fed. R. 68; *Thomas v. Wabash, etc., R. Co.*, 63 Fed. R. 200; *Louisville, etc., R. Co. v. Odill*, (Tenn.) 33 S. W. R. 611.

<sup>2</sup> *Hutchinson on Carriers*, § 292, citing *Toledo, etc., R. Co. v. Lockhart*, 71 Ill. 627; *Great Western, etc., R. Co. v. Burns*, 60 Ill. 284; *Galena, etc., Co. v. Rae*, 18 Ill. 488; *East, etc., R. Co. v. Nelson*, 1 Cold. (Tenn.) 272; *Sager v. Portsmouth, etc., R. Co.*, 31 Me. 228, s. c. 50 Am. Dec. 659; *Carter v. Peck*, 4 Sneed 203; *Southern, etc., R. Co. v. Womack*, 1 Heisk. 256; *Empire, etc., Co. v. Wamsutta, etc., Co.*, 63 Pa. St. 14, s. c. 3 Am. R. 515; *Place v. Union, etc., Co.*, 2 Hilt. 19; *Illinois Cent. R. Co. v. Waters*, 41 Ill. 73; *Great Western, etc., R. Co. v. Hawkins*, 18 Mich.

427; *Porcher v. Northeastern R. Co.*, 14 Rich. (Law) 181; *Condict v. Grand Trunk, etc., R. Co.*, 54 N. Y. 500; *Illinois Cent. R. Co. v. Cobb*, 64 Ill. 128; *Michigan, etc., R. Co. v. Burrows*, 33 Mich. 6; *Ray Imposed Negl. Carriers of Freight*, 75, citing some of the above cited cases.

<sup>3</sup> *Missouri, etc., Co. v. McFadden*, (Texas Civ. App.) 32 S. W. R. 18, s. c. 33 S. W. R. 853; *Jones v. George*, 61 Tex. 345; *Michaels v. New York, etc., R. Co.*, 30 N. Y. 564, s. c. 86 Am. Dec. 415; *Chicago, etc., U. Co. v. Sawyer*, 69 Ill. 285, s. c. 18 Am. R. 613.

<sup>4</sup> *Milligan v. Grand Trunk, etc., R. Co.*, 17 U. C. C. P. 115.

<sup>5</sup> *Thomas v. Lancaster Mills*, 71 Fed. R. 481. In the case cited it was said, "The loss would have occurred if the



which hold that where the loss of the goods is caused by a tempest, flood or the like, the carrier is nevertheless liable if its negligence contributed to the loss, support the ruling in the cases cited in the first note to this section,<sup>1</sup> but on the question decided in those cases there is conflict.<sup>2</sup>

§ 1489. Delay in transporting goods caused by the act of the owner.—Where the delay is caused by the act of the owner or consignor, and not by the negligence of the railroad company, it is not liable for loss caused by such delay. The owner or consignor is not, however, bound to give specific directions that there shall be no delay, for if he properly marks the goods and makes an effective delivery of them to the railroad carrier it is under a duty to transport them without unreasonable delay.<sup>3</sup> A carrier may be relieved from liability caused

barge had arrived at Cairo on the evening of the 28th of December, immediately prior to the fire, and had been moored at the place it occupied. The negligent delay was, standing alone, a remote and not a proximate cause, remotely contributing to the injury as an occasion or condition. *Railroad Co. v. Reeves*, 10 Wall. 176; *St. Louis, etc., R. Co. v. Commercial, etc., Co.*, 139 U. S. 223, s. c. 11 Sup. Ct. R. 554; *Hoadley v. Northern, etc., Co.*, 115 Mass. 304; *Morrison v. Davis*, 20 Pa. St. 171; *Goodlander, etc., Co. v. Standard Oil Co.*, 63 Fed. R. 400." The case from which we have quoted cites, among others, upon the subject of concurrent negligence the following cases: *Phenix, etc., Co. v. Erie, etc., Co.*, 117 U. S. 312, 6 Sup. Ct. R. 750, 1176; *Liverpool, etc., Co. v. Phenix, etc., Co.*, 129 U. S. 397, 9 Sup. Ct. R. 469; *California, etc., Co. v. Union, etc., Co.*, 133 U. S. 387, 10 Sup. Ct. R. 365; *Constable v. National, etc., Co.*, 154 U. S. 51, 14 Sup. Ct. R. 1062.

<sup>1</sup> *Davis v. Garrett*, 6 Bing. 716; *Williams v. Grant*, 1 Conn. 487; *Read v.*

*Spaulding*, 30 N. Y. 630; *Michigan, etc., Co. v. Curtis*, 80 Ill. 324; *Southern, etc., Co. v. Womack*, 1 Heisk. 256; *Bostwick v. Baltimore, etc., R. Co.*, 45 N. Y. 712; *Condict v. Grand Trunk, etc., R. Co.*, 54 N. Y. 500; *Dunson v. New York, etc., R. Co.*, 3 Lans. (N. Y.) 265; *Wolf v. American, etc., Co.*, 43 Mo. 421, s. c. 97 Am. Dec. 406; *Read v. St. Louis, etc., R. Co.*, 60 Mo. 199; *Pruitt v. Hannibal, etc., R. Co.*, 62 Mo. 527; *San Antonio, etc., R. Co. v. Barnett*, (Texas Civ. App.) 27 S. W. R. 676.

<sup>2</sup> *Denny v. New York, etc., R. Co.*, 13 Gray 481, s. c. 74 Am. Dec. 645; *Hoadley v. Northern, etc., Co.*, 115 Mass. 304, s. c. 15 Am. R. 106; *Morrison v. Davis*, 20 Pa. St. 171; *Railroad Co. v. Reeves*, 10 Wall. 176; *Gleeson v. Virginia, etc., R. Co.*, 140 U. S. 435; *Daniels v. Ballantine*, 23 Ohio St. 532, s. c. 13 Am. R. 264; *Michigan Cent. R. Co. v. Burrows*, 33 Mich. 6. See *Thomas v. Lancaster Mills*, 71 Fed. R. 481, 484.

<sup>3</sup> *Gregory v. Wabash, etc., R. Co.*, 46 Mo. App. 574.

by delay although there is no positive wrong on the part of the shipper, for if the mistake of the shipper causes the delay there can be no liability on the part of the carrier. But the carrier must in all cases exercise ordinary care to avoid loss, but what is ordinary care must usually depend upon the facts of the particular case. If the owner assumes to perform an act which will shorten the time and prevent delay the failure on his part to perform what he has undertaken may avail the carrier as an excuse for the delay.<sup>1</sup>

§ 1490. **Directions and instructions of shipper—Duty of obedience to.**—A railroad carrier that accepts goods from a shipper is, as a general rule, bound to follow the directions or instructions of the shipper.<sup>2</sup> A wrongful disobedience or a negligent failure to obey the directions of the shipper will render ineffective the stipulations of a contract limiting the liability of the carrier. There may, however, be causes which will not only excuse but will require a departure from the directions or instructions of the shipper.<sup>3</sup> But where instructions are not followed the burden is on the carrier to show a sufficient excuse for departing from them.

<sup>1</sup> Illinois, etc., R. Co. v. Miller, 32 Ill. App. 259.

<sup>2</sup> In *Express Co. v. Kountze*, 8 Wall. 342, 353, the court said, in speaking of carriers: "They are required to follow the instructions and directions given by the owner of the property concerning its transportation whenever practicable." Reference was made to *Redfield on Carriers*, § 34. See, also, *Streeter v. Horlock*, 1 Bing. 34; *Dunseth v. Wade*, 3 Ill. (2 Scam.) 285; *Johnson v. New York, etc., R. Co.*, 33 N. Y. 610, s. c. 88 Am. Dec. 416; *Merchants', etc., Co. v. Kahn*, 76 Ill. 520; *Marckwald v. Oceanic, etc., Co.*, 11 Hun 462; *Alabama, etc., R. Co. v. Thomas*, 89 Ala. 294, 7 So. R. 762. See, generally, *Philadelphia, etc., Co. v.*

*Beck*, 125 Pa. St. 620; *Clark v. St. Louis, etc., R. Co.*, 64 Mo. 440; *Galveston, etc., R. Co. v. Allison*, 59 Tex. 193; *Graham v. Davis*, 4 Ohio St. 362, s. c. 62 Am. Dec. 285; *Robinson v. Merchants', etc., R. Co.*, 45 Iowa 470; *Magnin v. Dinsmore*, 70 N. Y. 410, s. c. 26 Am. R. 608; *Witbeck v. Holland*, 45 N. Y. 13; *Rogers v. Wheeler*, 52 N. Y. 262; *Sager v. Portsmouth, etc., R. Co.*, 31 Me. 228, s. c. 50 Am. Dec. 659; *Stewart v. Merchants', etc., Co.*, 47 Iowa 229, s. c. 29 Am. R. 476.

<sup>3</sup> *Alabama, etc., R. Co. v. Thomas*, 89 Ala. 294, s. c. 7 So. R. 762; *Johnson v. New York, etc., R. Co.*, 33 N. Y. 610, s. c. 88 Am. Dec. 416; *Regan v. Grand Trunk, etc., R. Co.*, 61 N. H. 579.

§ 1491. **Fraud of shipper.**—In analogy to the principle which frees the carrier from liability where the loss is attributable to the negligence of the shipper it is held that the fraud of the shipper may relieve the carrier from responsibility.<sup>1</sup> In one of the cases it was held that where a shipper, in order to obtain lower rates, shipped in a basket tied with a rope, valuable silks, laces and silverware, and remained silent when he heard the agent of the carrier designate and bill the property as “household goods,” the shipper was guilty of such a fraud as relieved the carrier from liability.<sup>2</sup> Where the fraud, or, indeed, the mistake of the owner or consignor is the cause of a misdelivery of the goods the carrier is not liable, unless the carrier, having received information of the mistake, is guilty of negligence in failing to make a proper delivery of the goods.<sup>3</sup>

§ 1492. **Negligence of owner—Packing and loading goods.**—The owner of goods can not hold a carrier liable where the

<sup>1</sup>Orange Co. Bank v. Brown, 9 148 U. S. 627; Missouri, etc., R. Wend. 85; Chicago, etc., R. Co. v. Thompson, 19 Ill. 278; Belger v. Dinsmore, 51 N. Y. 166; Magnin v. Dinsmore, 62 N. Y. 35; Earnest v. Express Co., 1 Woods 573; Everett v. Southern, etc., Co., 46 Ga. 303; Oppenheimer v. United States, etc., Co., 69 Ill. 62; McCance v. London, etc., R. Co., 7 H. & N. 477; Bradley v. Waterhouse, 1 Moo. & M. 154; Relf v Rapp, 3 Watts & S. 21; Hayes v. Wells, 23 Cal. 185; St. John v. Express Co., 1 Woods 612; Brasher v. Denver, etc., R. Co., 12 Col. 384. See, Walker v. Jackson, 10 M. & W. 161; Camden, etc., R. Co. v. Baldauf, 16 Pa. St. 67; Little v. Boston, etc., R. Co., 66 Me. 239; Phillips v. Earle, 8 Pick. 182.

<sup>2</sup>Stimson v. Jackson, 58 N. H. 138; Congar v. Chicago, etc., R. Co., 24 Wis. 157, s. c. 1 Am. R. 164; Southern, etc., R. Co. v. Kaufman, 12 Heisk. 161; Dobbin v. Michigan, etc., R. Co., 56 Mich. 522; Wernwag v. Philadelphia, etc., R. Co., 117 Pa. St. 46; Mahon v. Blake, 125 Mass. 477; Erie, etc., R. Co. v. Wilcox, 84 Ill. 239, s. c. 25 Am. R. 451; Lake Shore, etc., R. Co. v. Hodapp, 83 Pa. St. 22; O'Rourke v. Chicago, etc., R. Co., 44 Iowa 526; Mahon v. Blake, 125 Mass. 477; Guillaume v. General Trans. Co., 100 N. Y. 491.

<sup>3</sup>Shackt v. Illinois Cent. R. Co., 94 Tenn. 658, s. c. 30 S. W. R. 742, 28 L. R. A. 176, citing Humphreys v. Perry.

loss or injury is the result of his own fault or that of the consignor in loading or packing the goods.<sup>1</sup> There can be no doubt that the doctrine stated is solidly founded on principle, but there is sometimes difficulty in determining whether the fault of the owner or consignor was the cause of the loss of the goods or of the injury to them. It has been held that where the owner or consignor improperly and insufficiently packed and loaded the goods, the carrier is relieved from liability if the loss or injury was attributable to the fault of the owner or consignor, although it had knowledge that the goods were insufficiently and improperly packed and loaded.<sup>2</sup> The rule is that carriers are not bound to break open packages to ascertain whether the articles contained in the packages are such as they are forbidden to carry,<sup>3</sup> and it seems to us that this rule applies to cases where goods have inherent defects, and requires the conclusion that the carrier is under no obligation to search for inherent defects in goods offered for transportation. Inherent defects in goods delivered to a carrier often cause their destruction, and where the loss is caused by such defects the carrier is not responsible.<sup>4</sup> The principle which relieves the carrier where the loss is attributable to the fault of the owner or consignor, applies to such cases, inasmuch as it is the wrong of the owner in requiring the transportation of such articles that is the proximate cause of the loss or injury. Although it is true that where the loss or injury to the goods is attributable to the negligence of the owner the carrier is re-

<sup>1</sup> *Goodman v. Oregon, etc., Co.*, 22 Ore. 14, s. c. 28 Pac. R. 894, 49 Am. & Eng. R. Cas. 87; *Klauber v. American, etc., R. Co.*, 21 Wis. 21, s. c. 91 Am. Dec. 452. See, as to evidence of negligence, *Missouri Pac. R. Co. v. Breeding*, 4 Tex. App. (Civ. Cas.) 217, s. c. 16 S. W. R. 184.

<sup>2</sup> *Ross v. Troy, etc., R. Co.*, 49 Vt. 364, s. c. 24 Am. R. 144.

<sup>3</sup> *State v. Swett*, 87 Me. 99, s. c. 47 Am. St. R. 306; *Bennett v. American, etc., Co.*, 83 Me. 236, s. c. 23 Am. St.

R. 774; *Nitro Glycerine Case*, 15 Wall. 524; *State v. Goss*, 59 Vt. 266, s. c. 59 Am. R. 706. As to the power of the legislature to enact statutes respecting the transportation of game or other commodities, see *American Express Co. v. People*, 133 Ill. 649, s. c. 23 Am. St. R. 641; *Bennett v. American Express Co.*, 83 Me. 236, s. c. 23 Am. St. R. 774.

<sup>4</sup> *Ohio, etc., R. Co. v. Dunbar*, 20 Ill. 623, s. c. 71 Am. Dec. 291 (citing *Addison on Cont.* 807).

lieved from liability, yet the carrier is not relieved unless the negligence of the owner or consignor was the proximate cause of the injury or loss, for the fault of the owner or consignor will not avail the carrier if its wrong or negligence was the proximate cause of the loss of the goods or of the injury to them.<sup>1</sup>

§ 1493. **Placing goods in an exposed position.**—Where a shipper voluntarily places goods intended for shipment in a place of danger the railroad company is not liable for their loss unless the loss was caused by its negligence. The shipper takes the risk, in such a case, of loss caused by the operation of the road in a reasonably careful and skillful mode, but he does not assume the risk of loss caused by the negligence of the company.<sup>2</sup> If the goods are put in a place where the company receives and accepts goods for transportation and are, in fact, delivered to the company, either actually or constructively, then the liability of the company is that of a common carrier. We suppose that where the goods are put by the owner or consignor in a place on the premises of the company where they are exposed to danger the company is not liable if they were put there without right but that if placed there under a license from the company it would be liable for their loss if caused by its negligence.<sup>3</sup>

<sup>1</sup> *McCarthy v. Louisville, etc., R. Co.*, 102 Ala. 193, s. c. 48 Am. St. R. 29. In the case cited it was held that when the carrier relies upon the exception "which rests upon the fault of the shipper, he must bring himself entirely and perfectly within it by negating all contributory fault of his own." The court cited *Lawson's Contracts of Carriers*, 177, 178; *Steele v. Townsend*, 37 Ala. 247, s. c. 79 Am. Dec. 49; *Grey v. Mobile, etc., Co.*, 55 Ala. 387, s. c. 28 Am. R. 729; *South, etc., R. Co. v. Henlein*, 52 Ala. 606, s. c. 23 Am. R. 578; *Louisville, etc., R. Co. v. Touart*, 97 Ala. 514; *Angell on*

*Carriers*, § 202; *Hutchinson on Carriers*, § 766.

<sup>2</sup> *St. Louis, etc., R. Co. v. Fire Asso.*, 55 Ark. 163, s. c. 18 S. W. R. 43; *Cook v. Champlain, etc., Co.*, 1 Denio 91; *Grand Trunk Railroad Co. v. Richardson*, 91 U. S. 454.

<sup>3</sup> In *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 473, it was said, "The fact that the destroyed property was located near the line of the railroad did not deprive the owners of the protection of the statute, certainly, if it was placed where it was under a license from the defendant. Such a location, if there was a license, was a lawful

§ 1494. What law governs—Law of the place—Conflict of law.—The general rule is that the law of the place where the contract is made enters as a silent but important factor into the contract. It is true that this general rule is to be taken in connection with the rule that the place of performance is often of controlling effect and also in connection with the rule that the form of the contract and the convention of the parties override the law.<sup>1</sup> But it is to be said of the rule last stated that while it is generally competent for the parties to regulate their rights and liabilities by contract,<sup>2</sup> it is not competent to contract to do a thing forbidden by positive law or by the principles of public policy recognized and enforced by the law of the place where the contract is entered into. The cases fully discuss the question here under immediate consideration and the rule deducible from them is this: where there is no provision or stipulation in the contract expressly or impliedly excluding the law of the place of shipment that law governs, and by it the rights and liabilities of the parties are to be determined.<sup>3</sup>

use of its property by the plaintiffs, and they did not lose their right to compensation for its loss occasioned by the negligence of the defendant." *Cook v. Champlain, etc., Co.*, 1 Denio 91; *Fero v. Buffalo, etc., R. Co.*, 22 N. Y. 209.

<sup>1</sup> Broom's Legal Maxims, 690.

<sup>2</sup> *Gott v. Gandy*, 23 L. J. Q. B. 1, 2 El. & Bl. 845; *Walker v. Birch*, 6 T. R. 258; *Facey v. Hurdom*, 3 B. & C. 213.

<sup>3</sup> *Liverpool, etc., Co. v. Phenix Ins. Co.*, 129 U. S. 397, s. c. 9 Sup. Ct. R. 469, (citing *Cox v. United States*, 6 Pet. 172; *Scudder v. Union Nat. Bank*, 91 U. S. 406; *Pritchard v. Norton*, 106 U. S. 124; *Watts v. Camors*, 115 U. S. 353; *Morgan v. New Orleans, etc., Railroad*, 2 Woods 244; *Hale v. New Jersey Navigation Co.*, 15 Conn. 539; *Dyke v. Erie, etc., R. Co.*, 45 N. Y. 113; *Pennsylvania Co. v. Fairchild*, 69 Ill. 260; *Grand v. Livingston*, 38 N.

Y. S. 490; *Arnold v. Potter*, 22 Iowa 194; *Talbott v. Merchants', etc., Co.*, 41 Iowa 247; *Cantu v. Bennett*, 39 Tex. 303; *First National Bank v. Shaw*, 61 N. Y. 283; *Don v. Lippmann*, 5 Cl. & F. 1; *Brooke v. New York, etc., R. Co.*, 108 Pa. St. 529; *Western, etc., R. Co. v. Exposition, etc., Mills*, 81 Ga. 522; *Hazel v. Chicago, etc., R. Co.*, 82 Iowa 477, s. c. 48 N. W. R. 926; *Fonseca v. Cunard, etc., Co.*, 153 Mass. 553, s. c. 27 N. E. R. 665, (citing *Greenwood v. Curtis*, 6 Mass. 358; *Forepaugh v. Delaware, etc., R. Co.*, 128 Pa. St. 217, 18 Atl. R. 503; *In re Missouri, etc., Co.*, L. R. 42 Ch. Div. 321); *Ryan v. Missouri, etc., R. Co.*, 65 Tex. 13. See upon the general subject *Davis v. Aetna, etc., Co.*, (N. H.) 34 Atl. R. 464; *Brown v. Camden, etc., R. Co.*, 83 Pa. St. 316; *Dyke v. Erie R. Co.*, 45 N. Y. 113; *McDaniel v. Chicago, etc., R. Co.*, 24 Iowa 412. In the case of *Fonseca v. Cunard, etc., Co.*, 153

It seems, however, from the reasoning of the leading English case that the court will accept, as the legal factor, the law the parties had in view at the time of entering into the contract.<sup>1</sup> But we suppose that what law it was that the parties had in view must be ascertained from the terms and conditions of the contract, read, as contracts must be, by the light of surrounding circumstances, for, as we believe, a written contract can not be varied by parol either as to the law factor thereof<sup>2</sup> or as to the element of fact which it contains or covers. A contract for the transportation of goods is regarded as "a single one"<sup>3</sup> and the law which constitutes a factor of the contract, or which acts upon it, influences and controls the contract as a unit and not in severed fragments. It can not, as we conceive, be justly said that the rule that the contract is a unit impinges upon the rule that one of several carriers in a route over which goods are transported is not liable for the negligence or wrongs of the other carriers, for the principle upon which rests the rule that one of several railroad carriers is held liable only for its own negligence or breach of duty is different from that upon which the rule declared in the case referred to is founded. It would, therefore, be misleading to broadly affirm that invariably and for all purposes a contract of carriage is to be regarded as "a single contract."

Mass. 553, s. c. 27 N. E. R. 665, will be found a valuable collection of cases upon the proposition that a shipper is bound by the printed conditions of the bill of lading, among them *Parker v. South Eastern Railway Co.*, L. R. 2 C. P. Div. 416; *Harris v. Great Western Railway Co.*, L. R. 1 Q. B. Div. 515; *Burke v. South Eastern Railway Co.*, 5 C. P. Div. 1; *Quimby v. Liverpool, etc., Railroad*, 150 Mass. 365, s. c. 23 N. E. R. 205; *Steers v. Boston, etc., Steamship Co.*, 57 N. Y. 1.

<sup>1</sup> *In re Missouri, etc., Co.*, L. R. 42 Ch. Div. 321.

<sup>2</sup> *Long v. Straus*, 107 Ind. 94, 97; *Tisloe v. Graeter*, 1 Blackf. 353; *Dale v. Evans*, 14 Ind. 288. "Undoubtedly necessary implication is as much part of an instrument as if that which is so implied was plainly expressed." Per Court in *Hudson, etc., Co. v. Pennsylvania, etc., Co.*, 8 Wall. 276, 288.

<sup>3</sup> *Liverpool, etc., Co. v. Phenix Ins. Co.*, 129 U. S. 397, s. c. 9 Sup. Ct. R. 469. See, *Post*, § 1506.

## CHAPTER LXI.

### CONTRACTS LIMITING LIABILITY.

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§ 1495. **The English rule.**—It has long been the custom for carriers to include in their bills of lading provisions limiting their liability as insurers, and when such provisions are voluntarily agreed to, or accepted by the shipper, they become binding upon him in so far as they are lawful and not prohibited by statute or against public policy. In England, it was held at a very early date that such a limitation might be made, not only by express contract but also by notice to the owner of the goods.<sup>1</sup> It was even held that this might be

<sup>1</sup> *Nicholson v. Willan*, 5 East. 507; *Southcote's case*, 4 Coke 83; *Gibbon Maving v. Todd*, 1 Starkie 59; note to *v. Paynton*, 4 Burr. 2298; *Smith v.*



done by a general public notice, brought to the knowledge of the shipper.<sup>1</sup> This rule, however, gave rise to so much uncertainty, confusion and injustice, that certain acts known as the "Land Carrier's Act" and the "Railway and Canal Traffic Act" were passed, in 1830 and in 1854 respectively, to regulate the matter. Under the former act it was held that, although public notices would no longer be sufficient, a special contract or notice might be enough to protect the carrier against liability for loss or injury to any of the articles enumerated in the act, even though occasioned by the negligence of its servants.<sup>2</sup> Under the latter act, however, carriers are prohibited from limiting their liability, except as to the articles named in the prior act, by "any notice, condition or declaration," unless it is in writing and signed by the shipper, or other proper party, and unless the conditions or limitation shall also be "adjudged by the court or judge, before whom any question relating thereto shall be tried, to be just and reasonable."<sup>3</sup> It has been held under this act, as formerly, that where alternative rates are given, a condition in the contract signed by the shipper that in consideration of the lower rate the carrier shall not be liable even for the negligence of itself or servants is reasonable and valid.<sup>4</sup>

### § 1496. Conflict among the American decisions.—In Amer-

Horne, 8 Taunt. 144. The English cases are reviewed in Hollister v. Nowlen, 19 Wend. (N. Y.) 234, s. c. 32 Am. Dec. 455; Cole v. Goodwin, 19 Wend. 251, s. c. 32 Am. Dec. 470, and Railroad Co. v. Lockwood, 17 Wall. (U. S.) 357.

<sup>1</sup> Hutchinson on Carriers, § 229, and authorities cited in last note, *supra*.

<sup>2</sup> See 1 Hodges on Railways, (7th ed.) 563, 574; Hutchinson on Carriers, § 232.

<sup>3</sup> See 1 Hodges on Railways, (7th ed.) 564, 565; Peek v. North Staffordshire R. Co., 10 H. L. Cas. 473, 32 L. J. Q. B. 241; Simons v. Great Western R. Co., 18 C. B. 805, 829.

<sup>4</sup> Lewis v. Great Western R. Co., L. R. 3. Q. B. Div. 195, 47 L. J. Q. B. 131; Manchester, etc., R. Co. v. Brown, L. R., 8 App. Cas. 703, 53 L. J. Q. B. 124; White v. Great Western, etc., R. Co., 2 Com. B. (N. S.) 7, 26 L. J. C. P. 158; Beal v. South Devon, etc., R. Co., 3 H. & Colt. 337. But see cases cited in 1 Hodges on Railways, (7th ed.) 570, and Hutchinson on Carriers, § 234, note, for conditions held unreasonable. The rule in Canada is similar to that in England. Hamilton v. Grand Trunk R. Co., 23 U. C. Q. B. 600; Spettigue v. Great Western R. Co., 15 U. C. C. P. 315.

ica the question as to the right to limit the extraordinary liability of a carrier seems to have arisen first in New York. It was there held in two well considered cases, decided about the same time, that such liability could not be limited by a mere general notice, although brought to the knowledge of the shipper, but the question as to the right to limit by an express special contract was not decided.<sup>1</sup> In a case which arose a few years later, however, it was held that this could not be done even by express contract.<sup>2</sup> But this last decision was afterwards disapproved by the highest court of the same state,<sup>3</sup> as well as by many other courts, including the Supreme Court of the United States.<sup>4</sup> It is now held in nearly every state that this liability of the carrier may be limited, to some extent at least, by a special express contract.<sup>5</sup> There is some conflict, however, among the decisions as to how far it may be so limited and as to what is sufficient to constitute a valid special contract. This will more fully appear from a review of the authorities to be considered in the following sections.

**§ 1497. No right to contract against liability for negligence in most jurisdictions.**—The rule supported by the weight of authority is that a common carrier can not by any kind of a contract exempt itself from liability as such for loss or injury occasioned by its own negligence or that of its servants.<sup>6</sup> This rule “rests upon considerations of public policy

<sup>1</sup> *Hollister v. Nowlen*, 19 Wend. 234, s. c. 32 Am. Dec. 455; *Cole v. Goodwin*, 19 Wend. 251, s. c. 32 Am. Dec. 470.

<sup>2</sup> *Gould v. Hill*, 2 Hill (N. Y.) 623.

<sup>3</sup> *Dorr v. New Jersey, etc., Co.*, 11 N. Y. 485, s. c. 62 Am. Dec. 125, and note.

<sup>4</sup> *New Jersey, etc., Co. v. Merchants' Bank*, 6 How. (U. S.) 344.

<sup>5</sup> See, *post*, § 1500. See, also, notes in 32 Am. Dec. 497, 82 Am. Dec. 379, 5 Am. St. R. 725, 3 L. R. A. 343, 13 L. R. A. 518, 3 Am. & Eng. R. Cas. 272, 7 Lewis' Am. R. & Corp. R. 282, and

11 Lewis' Am. R. & Corp. R. 647. Most of the authorities are collected and reviewed in the notes just referred to.

<sup>6</sup> *Willock v. Pennsylvania R. Co.*, 166 Pa. St. 184, s. c. 30 Atl. R. 948, 11 Lewis' Am. R. & Corp. R. 642, and note; *Thomas v. Wabash, etc., R. Co.*, 63 Fed. R. 200; *Bells v. St. Louis, etc., R. Co.*, 52 Fed. R. 903; *Woodburn v. Cincinnati, etc., R. Co.*, 40 Fed. R. 731; note to *Little Rock, etc., R. Co. v. Cravens*, 7 Lewis' Am. R. & Corp. R. 270, 284, where the authorities are classified by states; *Mobile, etc., R. Co. v. Hopkins*, 41 Ala. 486, s. c. 94

and upon the fact that to allow the carrier to absolve himself from the duty of exercising care and fidelity is inconsistent with the very nature of his undertaking."<sup>1</sup> The employment of a common carrier is a public one, and the fundamental principle upon which the law of common carriers was established was to secure the utmost care and diligence in the performance of their duties. For this reason they are held to the extraordinary liability of insurers. To permit them to contract against liability for their own negligence or that of their servants would be contrary to the whole spirit and policy of the law governing common carriers and would, in effect, authorize them to abandon the most essential duties of their employment. When we also consider that the parties do not stand upon an equal footing and that railroad companies are given many special privileges as corporations for the very rea-

Am. Dec. 607; Louisville, etc., R. Co. v. Grant, 99 Ala. 325, s. c. 13 So. R. 599; Atchison, etc., R. Co. v. Lawler, 40 Neb. 356, s. c. 58 N. W. R. 968; Indianapolis, etc., R. Co. v. Allen, 31 Ind. 394; Michigan, etc., R. Co. v. Heaton, 37 Ind. 448; Rosenfeld v. Peoria, etc., R. Co., 103 Ind. 121; Railroad Co. v. Lockwood, 17 Wall. (U. S.) 357; Inman v. South Carolina, etc., R. Co., 129 U. S. 128; Railway Co. v. Stevens, 95 U. S. 655; Stanard, etc., Co. v. White Line, etc., Co., 122 Mo. 258, s. c. 61 Am. & Eng. R. Cas. 185; Witting v. St. Louis, etc., R. Co., 101 Mo. 631, s. c. 14 S. W. R. 743, 45 Am. & Eng. R. Cas. 369; Johnson v. Alabama, etc., R. Co., 69 Miss. 191, s. c. 11 So. R. 104; Rhodes v. Louisville, etc., R. Co., 9 Bush. (Ky.) 688; School Dist. v. Boston, etc., R. Co., 102 Mass. 552, s. c. 3 Am. R. 502; Kansas City, etc., R. Co. v. Simpson, 30 Kan. 645, s. c. 2 Pac. R. 821; Squire v. New York, etc., R. Co., 98 Mass. 239, s. c. 93 Am. Dec. 162, and note; Branch v. Wilmington, etc., R. Co., 88 N. Car. 573; Ft. Worth, etc., R. Co. v. Great-house, 82 Tex. 104, s. c. 17 S. W. R. 834; Hudson v. Northern Pac. R. Co., (Iowa) 61 Am. & Eng. R. Cas. 329; Rose v. Des Moines, etc., R. Co., 39 Iowa 246; Hudson v. Northern Pac. R. Co., (Iowa) 60 N. W. R. 608; Louisville, etc., R. Co. v. Wynn, 88 Tenn. 320, s. c. 14 S. W. R. 311, 3 Lewis' Am. R. & Corp. R. 13; Little Rock, etc., R. Co. v. Talbot, 39 Ark. 523; Seller v. Steamship Pacific, 1 Ore. 409; Overland, etc., Co. v. Carroll, 7 Colo. 43; Union Pac. R. Co. v. Rainy, 19 Colo. 225, 61 Am. & Eng. R. Cas. 302; Willis v. Grand Trunk R. Co., 62 Me. 488; Merrill v. American Ex. Co., 62 N. H. 514; Berry v. Cooper, 28 Ga. 543; Union Ex. Co. v. Graham, 26 Ohio St. 595; Graham v. Davis, 4 Ohio St. 362; Maslin v. Baltimore, etc., R. Co., 14 W. Va. 180, s. c. 35 Am. R. 748; Brown v. Adams Ex. Co., 15 W. Va. 812. But see Zouch v. Chesapeake, etc., R. Co., 36 W. Va. 524, s. c. 17 L. R. A. 116.

<sup>1</sup> Moulton v. St. Paul, etc., R. Co., 31 Minn. 85.

son that they have such duties to perform for the public, there can be no doubt of the justice of this rule, especially as applied to such corporations.<sup>1</sup>

§ 1498. **Right to contract against liability for negligence in some jurisdictions.**—In several of the states it seems to be held, contrary to the weight of authority, that a common carrier may contract against liability for negligence. In some of them, however, a distinction is apparently made between slight or ordinary negligence and gross negligence, and it is held that the carrier can not, by contract, relieve itself from liability for the latter. In some jurisdictions also, in which the right to contract against liability for negligence in the carriage of goods is not recognized a distinction is made as against passengers riding on free passes. The New York rule seems to be that, while a common carrier can not, perhaps, stipulate for an exemption from liability for its own negligence, it may contract against liability for the negligence of its agents or servants in any degree.<sup>2</sup> The rule in Illinois is not entirely free from doubt. It seems, however, that the carrier may limit its liability for ordinary negligence but not for gross negligence.<sup>3</sup> In Wisconsin there are expressions to the same effect in some of the cases.<sup>4</sup> In some of the states, including Connecticut,<sup>5</sup>

<sup>1</sup> This is substantially the line of reasoning pursued by Justice Bradley in *Railroad Co. v. Lockwood*, 17 Wall. (U. S.) 357, of which a synopsis is given by Justice Gray in *Liverpool, etc., Co. v. Phoenix Ins. Co.*, 129 U. S. 397, s. c. 9 Sup. Ct. R. 469. See, also, the similar course of reasoning in *Davidson v. Graham*, 2 Ohio St. 131; *Christenson v. American Ex. Co.*, 15 Minn. 270, and in *Greenhood on Public Policy*, 513.

<sup>2</sup> *Mynard v. Syracuse, etc., R. Co.*, 71 N. Y. 180, s. c. 27 Am. R. 28; *Nicholas v. New York, etc., R. Co.*, 89 N. Y. 370; *Smith v. New York, etc., R. Co.*, 24 N. Y., 222; *Cragin v. New York, etc., R. Co.*, 51 N. Y. 61, s. c. 10 Am. R. 559; *Ulrich v. New York, etc., R. Co.*,

108 N. Y. 80; *French v. Buffalo, etc., R. Co.*, 4 Keyes (N. Y.) 108.

<sup>3</sup> *Illinois Cent. R. Co. v. Morrison*, 19 Ill. 136; *Wabash, etc., R. Co. v. Brown*, 152 Ill. 484, s. c. 39 N. E. R. 273; *Chicago, etc., R. Co. v. Hawk*, 42 Ill. App. 322. But see *Chicago, etc., R. R. Co. v. Chapman*, 133 Ill. 96, s. c. 24 N. E. R. 417; *Wabash, etc., R. Co. v. Jaggerman*, 115 Ill. 407.

<sup>4</sup> *Black v. Goodrich, etc., Co.* 55 Wis. 319; *Lawson v. Chicago, etc., R. Co.*, 64 Wis. 447. But see *Abrams v. Milwaukee, etc., R. Co.*, 87 Wis. 485. So, in West Virginia, *Zouch v. Chesapeake, etc., R. Co.*, 36 W. Va. 524, s. c. 17 L. R. A. 116.

<sup>5</sup> *Griswold v. New York, etc., R. Co.*, 53 Conn. 371.

Louisiana,<sup>1</sup> Massachusetts,<sup>2</sup> New Jersey,<sup>3</sup> and Wisconsin<sup>4</sup> it has been held that a railroad company may contract with a gratuitous passenger against the negligence of its servants. No exemption from liability for negligence, however, will be implied from doubtful language. It must be clearly and unequivocally expressed.<sup>5</sup>

§ 1499. **Right to limit liability prohibited by statute in some states.**—In Texas it is expressly provided by statute that, as to shipments within the state, common carriers of goods shall not limit or restrict their liability as it exists at common law.<sup>6</sup> It is held, however, that this statute does not apply to foreign or interstate shipments.<sup>7</sup> In Nebraska the constitution forbids a railroad company to limit its liability as a common carrier by special agreement with the shipper.<sup>8</sup> Somewhat similar statutes have been passed in several other states, and in one of them, at least, it has been expressly decided that such a statute is not repugnant to the constitution of the United States as a regulation of commerce.<sup>9</sup>

<sup>1</sup> *Higgins v. New Orleans, etc., R. Co.*, 28 La. Ann. 133. But prior decisions hold that a carrier of goods, at least, can not contract for exemption of liability for loss by negligence. *Roberts v. Riley*, 15 La. Ann. 103; *New Orleans, etc., R. Co. v. New Orleans, etc., Co.*, 20 La. Ann. 302.

<sup>2</sup> *Quimby v. Boston, etc., R. Co.*, 150 Mass. 365, s. c. 1 Lewis' Am. R. Corp. R. 113; *Hosmer v. Old Colony R. Co.*, 156 Mass. 506, s. c. 31 N. E. R. 652. But, as to the general rule, see preceding section and *Grace v. Adams*, 100 Mass. 505; *Hoadley v. Northern Trans. Co.*, 115 Mass. 304.

<sup>3</sup> *Kinney v. Central R. Co.*, 32 N. J. L. 407, 34 N. J. L. 513.

<sup>4</sup> *Annas v. Milwaukee, etc., R. Co.*, 67 Wis. 46.

<sup>5</sup> *Kenney v. New York, etc., R. Co.*, 125 N. Y. 422; *Rathbone v. New York, etc., R. Co.*, 140 N. Y. 48; *Mynard v. Syracuse, etc., R. Co.*, 71 N. Y. 180, s. c. 27 Am. R. 28; *McKay v. New York,*

*etc., R. Co.*, 50 Hun (N. Y.) 563; *Zimmer v. New York, etc., R. Co.*, 42 N. Y. S. R. 63; *Illinois Cent. R. Co. v. Read*, 37 Ill. 484; *Adams Ex. Co. v. Stettaners*, 61 Ill. 184.

<sup>6</sup> *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, s. c. 16 S. W. R. 441; *Missouri Pac. R. Co. v. Harris*, 1 Tex. App. (Civil Cases) 730; *Heaton v. Morgan's, etc., Co.*, 1 Tex. App. (Civil Cases) 425, and cases cited in the following note.

<sup>7</sup> *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, s. c. 19 S. W. R. 455, s. c. 17 L. R. A. 643; *Missouri Pac. R. Co. v. International, etc., Co.*, 84 Tex. 149, s. c. 19 S. W. R. 459.

<sup>8</sup> *Missouri Pac. R. Co. v. Vandeventer*, 26 Neb. 222, s. c. 41 N. W. R. 998, 3 L. R. A. 129, 37 Am. & Eng. R. Cas. 651. So in Kentucky. *Ohio, etc., R. Co. v. Tabor*, (Ky.) 36 S. W. R. 18.

<sup>9</sup> *Hart v. Chicago, etc., R. Co.*, 69 Iowa 485, s. c. 29 N. W. R. 597. See,

§ 1500. **Right to limit liability by special contract in most jurisdictions.**—The right of a carrier to limit its liability as an insurer is a different thing from the right to contract against liability for its own negligence, which, as we have shown, is generally denied. In nearly all jurisdictions a carrier may make a valid special contract limiting its common law liability as an insurer.<sup>1</sup> The contract must, however, be freely and fairly made, without extortion,<sup>2</sup> and must also be

also, Ohio, etc., *R. Co. v. Tabor*, (Ky.) 36 S. W. R. 18; *Galveston, etc., R. Co. v. Herring*, (Tex. Civ. App.) 36 S. W. R. 129; *Armstrong v. Galveston, etc., R. Co.*, (Tex. Civ. App.) 29 S. W. R. 1117; *Nashville, etc., R. Co. v. Alabama*, 128 U. S. 96, s. c. 9 Sup. Ct. R. 28; *Connell v. Western, etc., Telegraph Co.*, 108 Mo. 459, s. c. 18 S. W. R. 883; *Butner v. Western, etc., Telegraph Co.*, 2 Okla. 234, 37 Pac. R. 1087; *St. Joseph, etc., R. Co. v. Palmer*, 38 Neb. 463, s. c. 56 N. W. R. 957; *Hennington v. State*, 90 Ga. 396, s. c. 17 S. E. R. 1009.

<sup>1</sup> *Ante*, § 1496; *Blumenthal v. Brainerd*, 38 Vt. 402, s. c. 91 Am. Dec. 349, and note; *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, s. c. 5 Sup. Ct. R. 151; *New Jersey, etc., R. Co. v. Merchants' Bank*, 6 How. (U. S.) 344, 382; *Pennsylvania R. Co. v. Raiordon*, 119 Pa. St. 577; *Bingham v. Rogers*, 6 Watts & S. (Pa.) 495; *Mobile, etc., R. Co. v. Jarboe*, 41 Ala. 644; *Grace v. Adams Exp. Co.*, 100 Mass. 505; *Pemberton Co. v. New York, etc., R. Co.*, 104 Mass. 144; *Mobile, etc., R. Co. v. Weiner*, 49 Miss. 725; *Little v. Boston, etc., R. Co.*, 66 Me. 239; *Fillebrown v. Grand Trunk R. Co.*, 55 Me. 462; *Bankard v. Baltimore, etc., R. Co.*, 34 Md. 197, s. c. 6 Am. R. 321; *Camp v. Hartford, etc., Co.*, 43 Conn. 333; *Capehart v. Seaboard, etc., R. Co.*, 81 N. Car. 438, s. c. 31 Am. R. 505; *Pittsburgh, etc., R. Co. v. Barrett*, 36 Ohio

St. 448; *Zouch v. Chesapeake, etc., R. Co.*, 36 W. Va. 524, s. c. 17 L. R. A. 116; *Indianapolis, etc., R. Co. v. Forsythe*, 4 Ind. App. 326, s. c. 29 N. E. R. 1138; *Bartlett v. Pittsburgh, etc., R. Co.*, 94 Ind. 281; *Terre Haute, etc., R. Co. v. Sherwood*, 132 Ind. 129, s. c. 31 N. E. R. 781; *Parsons v. Monteath*, 13 Barb. (N. Y.) 353; *Weeks v. New York, etc., R. Co.*, 72 N. Y. 50, s. c. 28 Am. R. 104; *Hill v. Syracuse, etc., R. Co.*, 73 N. Y. 351, s. c. 29 Am. R. 163; *Dillard v. Louisville, etc., R. Co.*, 2 Lea (Tenn.) 288; *Nashville, etc., R. Co. v. Jackson*, 6 Heisk. (Tenn.) 271; *Virginia, etc., R. Co. v. Sayers*, 26 Gratt. (Va.) 328; *Western Trans. Co. v. Newhall*, 24 Ill. 466; *Chicago, etc., R. Co. v. Hale*, 2 Ill. App. 150; *Southern Exp. Co. v. Purcell*, 37 Ga. 103, s. c. 92 Am. Dec. 53, and note; *McFadden v. Missouri Pac. R. Co.*, 92 Mo. 343, s. c. 1 Am. St. R. 721; *Pacific Exp. Co. v. Foley*, 46 Kan. 457, s. c. 26 Pac. R. 665, s. c. 4 Lewis Am. R. & Corp. R. 365; *Michigan Cent. R. Co. v. Hale*, 6 Mich. 243; *Smith v. American Exp. Co.*, (Mich.) 66 N. W. R. 479; *Gulf, etc., R. Co. v. Gatewood*, 89 Tex. 89, s. c. 10 L. R. A. 419, and note.

<sup>2</sup> *Atchison, etc., R. Co. v. Dill*, 48 Kan. 210, s. c. 29 Pac. R. 148; *Adams Exp. Co. v. Nock*, 2 Duv. (Ky.) 562; *Little Rock, etc., R. Co. v. Cravens*, 57 Ark. 112, s. c. 20 S. W. R. 803, 7 Lewis' Am. R. & Corp. R. 270, and

reasonable<sup>1</sup> and supported by some consideration.<sup>2</sup> The authorities are not all in accord as to what will constitute a sufficient special contract, and there is some conflict among them as to the extent to which the liability of the carrier may be thus limited. These, and other phases of the subject, will be considered in the following sections.

§ 1501. **Nature of special contract required.**—In nearly all of the states except Pennsylvania<sup>3</sup> and North Carolina<sup>4</sup> the rule is well established that a common carrier can not limit or restrict its common law liability by a mere general notice, even though knowledge thereof is brought home to the shipper.<sup>5</sup> Such a notice is regarded merely as a proposal for a

note; Louisville, etc., R. Co. v. Sherrod, 84 Ala. 178; Missouri Pac. R. Co. v. Fagan, 72 Tex. 127, s. c. 13 Am. St. R. 776, and note; Kirby v. Western Union Tel. Co., 4 S. Dak. 439, s. c. 30 L. R. A. 612.

<sup>1</sup>Shea v. Minneapolis, etc., R. Co., (Minn.) 65 N. W. R. 458; Alabama, etc., R. Co. v. Little, 71 Ala. 611; New Orleans, etc., R. Co. v. Faler, 58 Miss. 911; Tarbell v. Royal Exchange, etc., R. Co., 110 N. Y. 170, s. c. 6 Am. St. R. 350; Central Vt. R. Co. v. Soper, 59 Fed. R. 879; Adams Exp. Co. v. Reagan, 29 Ind. 21, s. c. 92 Am. Dec. 332, and note; Merchants', etc., Co. v. Bloch, 86 Tenn. 392, s. c. 6 Am. St. R. 847; Branch v. Wilmington, etc., R. Co., 88 N. Car. 573; Liverpool, etc., Co. v. Phenix Ins. Co., 129 U. S. 397, s. c. 9 Sup. Ct. R. 469, and English cases cited *ante*, p. 2315, note.

<sup>2</sup>Post, § 1504.

<sup>3</sup>Laing v. Colder, 8 Pa. St. 479, s. c. 49 Am. Dec. 533; Pennsylvania R. Co. v. Raiordon, 119 Pa. St. 577, s. c. 4 Am. St. R. 670; Pennsylvania R. Co. v. Miller, 87 Pa. St. 395. But compare Verner v. Sweitzer, 32 Pa. St. 208.

<sup>4</sup>Capehart v. Seaboard, etc., R. Co., 81 N. Car. 438, s. c. 31 Am. R. 505.

See, also, Orndorff v. Adams Ex. Co., 3 Bush. (Ky.) 194, s. c. 96 Am. Dec. 207; Cooper v. Berry, 21 Ga. 526. But compare Smith v. North Carolina R. Co., 64 N. Car. 235. The rule in North Carolina seems to be in doubt.

<sup>5</sup>Cole v. Goodwin, 19 Wend. (N. Y.) 251, s. c. 32 Am. Dec. 470, and note where many authorities are collected and reviewed; Kansas City, etc., R. Co. v. Rodebaugh, 38 Kan. 45, s. c. 5 Am. St. R. 715, and note; Western Transp. Co. v. Newhall, 24 Ill. 466, s. c. 76 Am. Dec. 760, and note; Steele v. Townsend, 37 Ala. 247; St. Louis, etc., R. Co. v. Weakly, 50 Ark. 397; Kimball v. Rutland, etc., R. Co., 26 Vt. 247; Evansville, etc., R. Co. v. Young, 28 Ind. 516; Rosenfeld v. Peoria, etc., R. Co., 103 Ind. 121; Mobile, etc., R. Co. v. Weiner, 49 Miss. 725; Brown v. Adams Ex. Co., 15 W. Va. 812; Illinois Cent. R. Co. v. Frankenberg, 54 Ill. 88, s. c. 5 Am. R. 92; Georgia R. Co. v. Gann, 68 Ga. 350; Gaines v. Union Transp. Co., 28 Ohio St. 418; Jones v. Voorhees, 10 Ohio 145; Lewis v. New York, etc., Co., 143 Mass. 267; s. c. 9 N. E. R. 615; New Jersey, etc., Co. v. Merchants' Bank, 6 How. (U. S.) 344.

contract and is not binding upon the shipper unless he assents to its terms.<sup>1</sup> Thus, it has been held that a notice given in a newspaper, or in a placard posted up in a public place or even on the back of a receipt, is insufficient of itself to bind the shipper and relieve the company from liability.<sup>2</sup> So, it has been held that a notice printed or stamped upon a ticket or check is insufficient unless it appears that the passenger or shipper assented thereto.<sup>3</sup> But the acceptance of a bill of lading in which the terms of the special contract are fairly set forth may be sufficient evidence of assent thereto,<sup>4</sup> except in those jurisdictions in which the special contract is required to be signed by the shipper. So, as stated by Greenleaf, "it is now well settled that a common carrier may qualify his liability by a general notice to all who may employ him of any reasonable requisition to be observed on their part in regard to the manner of delivery and entry of parcels, and the information to be given him of their contents, the rates of freight and the like, as, for example, that he will not be responsible

<sup>1</sup> *Buckland v. Adams Ex. Co.*, 97 Mass. 124; *Blumenthal v. Brainerd*, 38 Vt. 402, s. c. 91 Am. Dec. 349, and note; *Moses v. Boston, etc., R. Co.*, 24 N. H. 71; *Belger v. Dinsmore*, 51 Barb. (N. Y.) 69; *Dorr v. New Jersey, etc., Co.*, 11 N. Y. 485.

<sup>2</sup> *Malone v. Boston, etc., R. Co.*, 12 Gray (Mass.) 388, s. c. 74 Am. Dec. 598; *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85, s. c. 14 Am. R. 716; *Peck v. Weeks*, 34 Conn. 145; *Newell v. Smith*, 49 Vt. 255; *Macklin v. New Jersey, etc., Co.*, 7 Abb. Pr. N. S. (N. Y.) 229; *Brown v. Adams Ex. Co.*, 15 W. Va. 812; *Railroad Co. v. Manufacturing Co.*, 16 Wall. (U. S.) 318; *Merchants', etc., Co. v. Furthmann*, 149 Ill. 66, s. c. 61 Am. & Eng. R. Cas. 145. But see *Cresson v. Philadelphia, etc., R. Co.*, 11 Phila. (Pa.) 597.

<sup>3</sup> *Kansas City, etc., R. Co. v. Rodebaugh*, 38 Kan. 45, s. c. 5 Am. St. R. 715, and note; *Brown v. Eastern R.*

*Co.*, 11 Cush. (Mass.) 97; *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 212, s. c. 8 Am. R. 543; *Perkins v. New York Cent. R. Co.*, 24 N. Y. 196; *Wilson v. Chesapeake, etc., R. Co.*, 21 Gratt. (Va.) 654; *Indianapolis, etc., R. Co. v. Cox*, 29 Ind. 360; *Baltimore, etc., R. Co. v. Campbell*, 36 Ohio St. 647, s. c. 38 Am. R. 617. But see *Steers v. Liverpool, etc., Co.*, 57 N. Y. 1, s. c. 15 Am. R. 453.

<sup>4</sup> *Steele v. Townsend*, 37 Ala. 247, s. c. 79 Am. Dec. 49, and note; *McMillan v. Michigan Southern, etc., R. Co.*, 16 Mich. 79, s. c. 93 Am. Dec. 208; *Grace v. Adams*, 100 Mass. 505, s. c. 1 Am. R. 131; *Mulligan v. Illinois Cent. R. Co.*, 36 Iowa 181; *Kirkland v. Dinsmore*, 62 N. Y. 171; *Boorman v. American Ex. Co.*, 21 Wis. 154; *Baltimore, etc., R. Co. v. Brady*, 32 Md. 333. But see *Adams' Ex. Co. v. Stettaners*, 61 Ill. 184, s. c. 14 Am. R. 57.



for goods above the value of a certain sum, unless they are entered as such and paid for accordingly."<sup>1</sup> These are matters which the carrier has a right to properly regulate in the conduct of its business and about which it is entitled to information in order to fix the charges and determine what precautions are necessary in the carriage of the goods.<sup>2</sup> An express special contract is, therefore, unnecessary. But this is the only clearly defined exception, if, indeed, it can be called an exception, to the general rule that a special contract is required in order to relieve the carrier from its liability as an insurer. In some jurisdictions the contract is required by statute to be in writing and signed by the shipper or owner of the goods.<sup>3</sup>

**§ 1502. Limitation in receipt or bill of lading.**—The common law liability of a common carrier as an insurer may be, and usually is, limited by a special contract embodied in the receipt or bill of lading.<sup>4</sup> When the special contract is express and supported by a sufficient consideration it matters not, in most jurisdictions, in what manner or form it is made. The minds of the parties must, however, meet in order to form the

<sup>1</sup> 2 Greenleaf on Ev., § 215; *McMillan v. Michigan Southern, etc., R. Co.*, 16 Mich. 79, 110, s. c. 93 Am. Dec. 208; *Oppenheimer v. United States Ex. Co.*, 69 Ill. 62; *Erie R. Co. v. Wilcox*, 84 Ill. 239, s. c. 25 Am. R. 451; *Magnin v. Dinsmore*, 62 N. Y. 35, s. c. 20 Am. R. 442; *Farmers', etc., Bank v. Champlain, etc., Co.*, 23 Vt. 186, 206; *Judson v. Western R. Co.*, 6 Allen (Mass.) 486, 493; *Snider v. Adams Ex. Co.*, 63 Mo. 376; *Lawrence v. New York, etc., R. Co.*, 36 Conn. 63; *Kallman v. United States Ex. Co.*, 3 Kan. 205; *Pacific Ex. Co. v. Foley*, 46 Kan. 457, s. c. 26 Pac. R. 665, 4 Lewis' Am. R. & Corp. R. 365; *Mulligan v. Illinois Cent. R. Co.*, 36 Iowa 181; *Orange County Bank v. Brown*, 9 Wend. (N. Y.) 85; *Duntley v. Boston, etc., R. Co.*, 66 N. H.

263, s. c. 20 Atl. R. 327; *Rathbone v. New York, Cent., etc., R. Co.*, 140 N. Y. 48.

<sup>2</sup> *Lawson's Cont. of Carriers*, § 88; *Oppenheimer v. United States Ex. Co.*, 69 Ill. 62.

<sup>3</sup> See *Hutchinson on Carriers*, § 243a; *Hartwell v. Northern Pac. R. Co.*, 5 Dak. 463, s. c. 3 L. R. A. 342; *Kirby v. Western Union Tel. Co.*, 4 S. Dak. 105, 439, s. c. 30 L. R. A. 612, 55 N. W. R. 759; *Burroughs v. Grand Trunk R. Co.*, 67 Mich. 351; *Ohio, etc., R. Co. v. Hamlin*, 42 Ill. App. 441; *Central R., etc., Co. v. Hasselkus*, 91 Ga. 382, s. c. 17 S. E. R. 838.

<sup>4</sup> See authorities cited in the next three notes. See, also, *Limiting Liability of Express Companies*, 29 Cent. L. J. 108.

contract, as in other cases, that is, the terms proposed by the carrier must be accepted or assented to by the shipper. It is generally held, and correctly as we think, that the acceptance of the receipt or bill of lading in which the terms are clearly stated, without objection, is sufficient to make a special contract within the meaning of the law, which will be binding upon the parties according to its terms, provided it is fairly and freely made and is reasonable and not opposed to public policy.<sup>1</sup> Some of the authorities hold that the acceptance of such a receipt or bill of lading, without objection, is *prima facie* evidence of assent to the proposed contract,<sup>2</sup> but the better rule, and that supported by the weight of authority is that, in the absence of fraud, imposition, or the like, it is conclusive.<sup>3</sup> It is

<sup>1</sup> *Steele v. Townsend*, 37 Ala. 247, s. c. 79 Am. Dec. 49, and note; *Jones v. Cincinnati, etc., R. Co.*, 89 Ala. 376; *Cincinnati, etc., R. Co. v. Pontius*, 19 Ohio St. 221, s. c. 2 Am. R. 391; *McMillian v. Michigan Southern R. Co.*, 16 Mich. 79; *Missouri Pac. R. Co. v. Beeson*, 30 Kan. 298; *Merrill v. American Exp. Co.*, 62 N. H. 514; *Boorman v. American Exp. Co.*, 21 Wis. 154; *Louisville, etc., R. Co. v. Brownlee*, 14 Bush. (Ky.) 590; *Merchants', etc., Co. v. Bloch*, 86 Tenn. 392; *Piedmont, etc., Co. v. Columbia, etc., R. Co.*, 19 S. Car. 353; *Bethea v. Northeastern R. Co.*, 26 S. Car. 91; *Hill v. Syracuse, etc., R. Co.*, 73 N. Y. 351, s. c. 29 Am. R. 163; *Mulligan v. Illinois Cent. R. Co.*, 36 Iowa 181; *Snider v. Adams Exp. Co.*, 63 Mo. 376; *Davis v. Central Vt. R. Co.*, 66 Vt. 290, s. c. 61 Am. & Eng. R. Cas. 197; *Calderon v. Atlas Steamship Co.*, 64 Fed. R. 874 (shipper bound by conditions referred to in body of bill of lading and endorsed on back.) *Contra*, *Adams Exp. Co. v. Haynes*, 42 Ill. 89; *Erie, etc., R. Co. v. Dater*, 91 Ill. 195, s. c. 33 Am. R. 51; *Adams Exp. Co. v. Stettaners*, 61 Ill. 184; *Merchants', etc., Co. v. Leysor*, 89 Ill. 43; *Southern Exp. Co. v. Moon*,

39 Miss. 822; *Mobile, etc., R. Co. v. Weiner*, 49 Miss. 725; *Levering v. Union Trans., etc., Co.*, 42 Mo. 88.

<sup>2</sup> *King v. Woodbridge*, 34 Vt. 565; *Christenson v. American Exp. Co.*, 15 Minn. 270; *Adams Exp. Co. v. Nock*, 2 Duv. (Ky.) 562; *Morrison v. Phillips, etc., Co.*, 44 Wis. 405; *Baltimore, etc., R. Co. v. Brady*, 32 Md. 333; *Southern Exp. Co. v. Barnes*, 36 Ga. 532; *Georgia, etc., R. Co. v. Beatie*, 66 Ga. 438; *Strohn v. Detroit, etc., R. Co.*, 21 Wis. 554, s. c. 94 Am. Dec. 564.

<sup>3</sup> *Louisville, etc., R. Co. v. Meyer*, 78 Ala. 597; *Grace v. Adams*, 100 Mass. 505; *Kirkland v. Dinsmore*, 62 N. Y. 171; *Johnstone v. Richmond, etc., R. Co.*, 39 S. Car. 55, s. c. 17 S. E. R. 512; *Germania, etc., Ins. Co. v. Memphis, etc., R. Co.*, 72 N. Y. 90; *Zimmer v. New York Central, etc., R. Co.*, 137 N. Y. 460, s. c. 33 N. E. R. 642; *Lawrence v. New York, etc., R. Co.*, 36 Conn. 63; *St. Louis, etc., R. Co. v. Weakly*, 50 Ark. 397; *Robinson v. Merchants', etc., Co.*, 45 Iowa 470; *Wertheimer v. Pennsylvania, R. Co.*, 1 Fed. R. 232, s. c. 17 Blatch. 421; *Durgin v. American Exp. Co.*, 66 N. H. 277, s. c. 20 Atl. R. 328, 9 L. R. A. 453; *Railroad Co. v. Androscoggin*

not meant by this rule, however, that assent will be conclusively presumed under all circumstances. If a shipper, without negligence on his part, is misled by the fraud or artifice of the carrier, or the like, so that the minds of the parties can not be presumed to have met, the mere acceptance of the receipt or bill of lading may not be sufficient to bind the shipper to all its terms.<sup>1</sup> So, where the carrier accepts the goods unconditionally, unless there is some valid and controlling custom to the contrary or other circumstance peculiar to the particular case, the acceptance by the shipper of a receipt or bill of lading containing the proposed special contract, after the goods are shipped, will not relieve the carrier from liability.<sup>2</sup>

§ 1503. **Parol limitation.**—A special contract limiting the liability of the carrier as an insurer may be verbal as well as written, unless the statute requires it to be in writing. It may be more difficult to establish a specific parol contract, but, when once clearly established, it is as obligatory as a written one.<sup>3</sup> Of course, where there is a complete written contract,

Mills, 22 Wall. (U. S.) 594. In the first four cases above cited, it is held that the fact that the shipper did not read it makes no difference.

<sup>1</sup> See *Perry v. Thompson*, 98 Mass. 249; *Blossom v. Dodd*, 43 N. Y. 264; *Madan v. Sherard*, 73 N. Y. 329; *Rosenfeld v. Peoria, etc., R. Co.*, 103 Ind. 121; *Camden, etc., R. Co. v. Baldauf*, 16 Pa. St. 67, s. c. 55 Am. Dec. 481; *Verner v. Sweitzer*, 32 Pa. St. 208; *Butler v. Heane*, 2 Camp. 415; *Atchison, etc., R. Co. v. Dill*, 48 Kan. 210, s. c. 29 Pac. R. 148.

<sup>2</sup> *Southard v. Minneapolis, etc., R. Co.*, 60 Minn. 382, s. c. 62 N. W. R. 442, 619, 61 Am. & Eng. R. Cas. 282; *Blossom v. Griffin*, 13 N. Y. 569; *Park v. Preston*, 108 N. Y. 434; *Gaines v. Transportation Co.*, 28 Ohio St. 418; *Bostwick v. Baltimore, etc., R. Co.*, 45 N. Y. 712; *Swift v. Pacific, etc., Co.*, 106 N. Y. 206; *Wilde v. Merchants'*

*Dispatch Co.*, 47 Iowa 247; *Gott v. Dinsmore*, 111 Mass. 45; *Union Pac. R. Co. v. Marston*, 30 Neb. 241, s. c. 46 N. W. R. 485; *Michigan Cent. R. Co. v. Boyd*, 91 Ill. 268; *Merchants', etc., Co. v. Furthman*, 149 Ill. 66, s. c. 36 N. E. R. 624, 9 Lewis' Am. R. & Corp. R. 19; *Merchants' Dispatch Co. v. Cornforth*, 3 Colo. 280; *Snow v. Indiana, etc., R. Co.*, 109 Ind. 422; *Central etc., R. Co., Dwight Mfg. Co.*, 75 Ga. 609; *Wheeler v. New Brunswick, etc., R. Co.*, 115 U. S. 29. But see as to the effect of a custom to send bill of lading after receipt of goods. *Shelton v. Merchants', etc., Co.*, 59 N. Y. 258.

<sup>3</sup> *Roberts v. Riley*, 15 La. Ann. 103; *Illinois Cent. R. Co. Morrison*, 19 Ill. 136; *American Transp. Co. v. Moore*, 5 Mich. 368. See, also, *Mobile, etc., R. Co. v. Jurey*, 111 U. S. 584, s. c. 4 Sup. Ct. R. 566.

it can not, as a rule, be contradicted or varied by oral evidence, and all verbal agreements made prior to the execution of the bill of lading are usually merged therein;<sup>1</sup> but, as we have seen,<sup>2</sup> there are cases in which, after the carrier has once accepted and shipped the goods under an unconditional parol contract, it can not afterwards limit its liability by a receipt or bill of lading; and so, on the other hand, after a receipt or bill of lading has been executed, a new contract may doubtless be made, in parol, upon a new consideration, whereby the liability of the carrier may be properly limited or other changes made in the terms of the original contract.<sup>3</sup>

§ 1504. **Consideration necessary.**—It is frequently stated in general terms that a common carrier may, by contract, limit its common law liability as an insurer. But, as we have already said, the contract must be reasonable and must have some consideration to support it.<sup>4</sup> The carrier has no right to force such a contract upon the shipper, and the latter must usually have the option of having his goods carried without any such restriction upon the liability of the carrier at a higher rate of freight proportionate to the risk.<sup>5</sup> If he is given such

<sup>1</sup> *Ante*, §§ 1415, 1423.

<sup>2</sup> *Ante*, § 1502, p. 2325, note 2. See, particularly, *Merchants' Dispatch, etc., Co. v. Furthmann*, 149 Ill. 66, s. c. 36 N. E. R. 624, 61 Am. & Eng. R. Cas. 145; *Bostwick v. Baltimore, etc., R. Co.*, 45 N. Y. 712; *Hamilton v. Western, etc., R. Co.*, 96 N. Car. 398; *Union Pac. R. Co. v. Marston*, 30 Neb. 241, s. c. 46 N. W. R. 485; *Missouri Pac. R. Co. v. Beeson*, 30 Kan. 298; *Wheeler v. New Brunswick, etc., R. Co.*, 115 U. S. 29, s. c. 5 Sup. Ct. R. 1061, 1160.

<sup>3</sup> See *The Delaware*, 14 Wall. (U. S.) 579; *Baltimore, etc., R. Co. v. Brown*, 54 Pa. St. 77. We mean that such a contract would be valid as between the parties. We are not here considering the rights of a *bona fide* purchaser of the bill of lading.

<sup>4</sup> *Wehmann v. Minneapolis, etc., R. Co.*, 58 Minn. 22, s. c. 59 N. W. R. 546, 61 Am. & Eng. R. Cas. 273; *Adams Exp. Co. v. Harris*, 120 Ind. 73, s. c. 7 L. R. A. 214; *Louisville, etc., R. Co. v. Sowell*, 90 Tenn. 17, s. c. 15 S. W. R. 837; *Conover v. Pacific Exp. Co.*, 40 Mo. App. 31; *Louisville, etc., R. Co. v. Gilbert*, 88 Tenn. 430, s. c. 7 L. R. A. 162; *Western R. Co. v. Harwell*, 91 Ala. 340, s. c. 8 So. R. 649; *Baughman v. Louisville, etc., R. Co.*, 94 Ky. 150, 21 S. W. R. 757; *Olwell v. Adams Exp. Co.*, 1 Cent. L. J. 186; *Kansas Pac. R. Co. v. Reynolds*, 17 Kan. 251; *Kellerman v. Kansas City, etc., R. Co.*, (Mo.) s. c. 34 S. W. R. 41; *Peek v. North Staffordshire R. Co.*, 10 H. L. Cas. 473.

<sup>5</sup> *Little Rock, etc., R. Co. v. Cravens*, 57 Ark. 112, s. c. 20 S. W. R. 803, 18

an option, however, a decrease in the rate as an inducement for the special contract reasonably limiting the common law liability of the carrier will be a sufficient consideration to support such contract.<sup>1</sup> But the mere receipt of the goods and undertaking to carry, in the absence of any such option or reduced rate, is not a sufficient consideration, and no reduction in the rate will be presumed where it is forbidden by statute.<sup>2</sup> So, as we have seen, no such presumption arises where the carrier has agreed to transport the goods without any stipulation limiting its liability, and, after they have been shipped, executes a bill of lading containing a clause limiting its liability.<sup>3</sup> But it seems that such a consideration will usually be presumed in the absence of anything to the contrary,<sup>4</sup> and the carrier is not obliged to specifically tender to the shipper a contract omitting the limited liability clause unless the latter requests it.<sup>5</sup>

L. R. A. 527, 7 Lewis' Am. R. & Corp. R. 270, and note; *Judson v. Western R. Co.*, 6 Allen (Mass.) 486, s. c. 83 Am. Dec. 646; *York Co. v. Central R. Co.*, 3 Wall. (U. S.) 107; *Atchison, etc., R. Co. v. Dill*, 48 Kan. 210, s. c. 29 Pac. R. 148; *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, s. c. 2 L. R. A. 75; *McFadden v. Missouri Pac. R. Co.*, 92 Mo. 343; *Louisville, etc., R. Co. v. Sherrod*, 84 Ala. 178.

<sup>1</sup> *Nelson v. Hudson River, etc., R. Co.*, 48 N. Y. 498; *Louisville, etc., R. Co. v. Manchester Mills*, 88 Tenn. 653, s. c. 14 S. W. R. 314; *Richmond, etc., R. Co. v. Payne*, 86 Va. 481, s. c. 6 L. R. A. 849; *Johnstone v. Richmond, etc., R. Co.*, 39 S. Car. 55, s. c. 17 S. E. R. 512; *Hill v. Boston, etc., R. Co.*, 144 Mass. 284, s. c. 10 N. E. R. 836; *St. Louis, etc., R. Co. v. Weakly*, 50 Ark. 397, s. c. 7 Am. St. R. 104; *Bartlett v. Pittsburgh, etc., R. Co.*, 94 Ind. 281; *Farnham v. Camden, etc., R. Co.*, 55 Pa. St. 53; *Duntley v. Boston, etc., R. Co.*, 66 N. H. 263, s. c. 20 Atl.

R. 327; *Zouch v. Chesapeake, etc. R. Co.*, 36 W. Va. 524, s. c. 17 L. R. A. 116; *Myers v. Wabash, etc., R. Co.*, 90 Mo. 98; *Brown v. Manchester, etc., R. Co.*, L. R. 10 Q. B. Div. 250; *Manchester, etc., R. Co. v. Brown*, L. R. 8 App. Cas. 703. Most of the cases cited in § 1500, *ante*, are to the same effect.

<sup>2</sup> *Wehmann v. Minneapolis, etc., R. Co.*, 58 Minn. 22, s. c. 59 N. W. R. 546, 61 Am. & Eng. R. Cas. 273. See, also, *Seybolt v. New York, etc., R. Co.*, 95 N. Y. 562, 575.

<sup>3</sup> *Ante*, § 1502, p. 2325, note 2, and § 1423 and notes.

<sup>4</sup> *York, etc., Co. v. Cent. R. Co.*, 3 Wall. (U. S.) 107; *McMillan v. Michigan Southern R. Co.*, 16 Mich. 79; *Louisville, etc., R. Co. v. Oden*, 80 Ala. 38; *St. Louis, etc., R. Co. v. Lesser*, 46 Ark. 236; *Sprague v. Missouri Pac. R. Co.*, 34 Kan. 347. But see *Baltimore, etc., R. Co. v. Brady*, 32 Md. 333.

<sup>5</sup> *Louisville, etc., R. Co. v. Sowell*, 90 Tenn. 17, s. c. 15 S. W. R. 837.

§ 1505. **Construction of contract.**—Contracts limiting or restricting the common law liability of a common carrier are to be construed strictly against the carrier.<sup>1</sup> Thus, where the liability of the carrier is limited only as to articles of certain specified classes, articles not falling clearly within one of those classes will not be included.<sup>2</sup> So, where words specifying the particular risks as to which the liability of the carrier is to be limited are followed by general words of exemption the latter should usually be construed to embrace only dangers or risks of the same general class or kind as those previously specified.<sup>3</sup> Although special perils are unconditionally excepted, such as loss by fire, for instance, the exception should be so construed as not to cover losses caused by the negligence of the carrier or its servants, even in those jurisdictions in which the carrier may contract against liability for negligence, unless it very clearly appears that it was the intention of the parties to include in the exemption losses by reason of such negligence.<sup>4</sup>

<sup>1</sup> *Stanard, etc., Co. v. White Line, etc., Co.*, 122 Mo. 258, s. c. 26 S. W. R. 704, 61 Am. & Eng. R. Cas. 185; *Barter v. Wheeler*, 49 N. H. 9; *Nicholas v. New York, etc., R. Co.*, 89 N. Y. 370, s. c. 9 Am. & Eng. R. Cas. 103; *Kansas City, etc., R. Co. v. Holland*, 68 Miss. 351, s. c. 8 So. R. 516; *Black v. Goodrich Transportation Co.*, 55 Wis. 319; *St. Louis, etc., R. Co. v. Smuck*, 49 Ind. 302; *Montgomery, etc., R. Co. v. Edmonds*, 41 Ala. 667; *Little Rock, etc., R. Co. v. Talbot*, 39 Ark. 523; *Hooper v. Wells, etc., Co.*, 27 Cal. 11; *Louisville, etc., R. Co. v. Touart*, 97 Ala. 514, s. c. 11 So. R. 756; *Mitchell v. Lancashire, etc., R. Co.*, L. R. 10 Q. B. 256; *Robinson v. Great Western R. Co.*, 35 L. J. Com. P. 123 ("owner's risk" does not include delay) *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166. In *Lewis v. Great Western, etc., R. Co.*, L. R. 3 Q. B. Div. 195, it is said that the construction of such a contract is for the court and that it should take into consideration all of

the circumstances, including the course of dealing between the parties.

<sup>2</sup> *Cream City R. Co. v. Chicago, etc., R. Co.*, 63 Wis. 93, s. c. 53 Am. R. 267.

<sup>3</sup> *Hawkins v. Great Western R. Co.*, 17 Mich. 57; *Menzell v. Railway Co.*, 1 Dillon (U. S. C. C.) 531. So, it is a general rule, often applied in other cases, that general words followed by or used in connection with more specific words are restricted by the latter so far, at least, as to make the general words apply only to things *ejusdem generis*. *Driscoll v. Fiske*, 21 Pick. (Mass.) 503; *Mims v. Armstrong*, 31 Md. 87, s. c. 1 Am. R. 22; *Wilkes v. Ferris*, 5 Johns. (N. Y.) 335; *Edsall v. Camden, etc., Co.*, 50 N. Y. 661; *Barter v. Wheeler*, 49 N. H. 9, s. c. 6 Am. R. 434.

<sup>4</sup> *Spinetti v. Atlas, etc., Co.*, 80 N. Y. 71, 75; *Holsapple v. Rome, etc., R. Co.*, 86 N. Y. 275; *Kenney v. New York, etc., R. Co.*, 125 N. Y. 422; *Elliott v. New York, etc., R. Co.*, 33

In one case it was held that a stipulation releasing the carrier from "any and all damage that may occur to said goods arising from leakage or decay, chafing or breakage, or from any other cause not the result of collision of trains or of cars being thrown from the track," did not relieve the company where the property was wholly consumed by fire, as the word "damage" did not cover a total loss.<sup>1</sup> In another case it was held that a limitation of liability to a certain amount on each package of goods did not apply to bales of cotton, for the reason that they were not packages within the meaning of the stipulation.<sup>2</sup> So where goods were shipped and carried partly by rail and partly by water a provision exempting the carrier from liability for "damages by fire or collision on the rivers or sea" did not cover loss by fire on land.<sup>3</sup>

§ 1506. **Conflict of laws.**—It has been held that the contract exempting the carrier must be proved, as a matter of evidence, according to the law of the forum;<sup>4</sup> but the general rule is that the law of the place where it is made and is to be performed, either in whole or in part, governs as to its nature, validity and interpretation.<sup>5</sup> So, it has been held that, al-

N. Y. S. R. 861; *Mynard v. Syracuse*, etc., R. Co., 71 N. Y. 180; *Phoenix, etc., Works v. Pittsburgh*, etc., R. Co., 139 Pa. St. 284, s. c. 20 Atl. R. 1058; *The Guildhall*, 58 Fed. R. 796; *New Orleans, etc., Ins. Co. v. New Orleans*, etc., R. Co., 20 La. Ann. 302; *Simon v. Steamship Fung Shuey*, 21 La. Ann. 363; *Ball v. Wabash*, etc., R. Co., 83 Mo. 574; *McFadden v. Missouri Pac. R. Co.*, 92 Mo. 343, s. c. 1 Am. St. R. 721; *Rooth v. Northeastern R. Co.*, L. R. 2 Ex. 173; *Lewis v. Great Western R. Co.*, L. R. 3 Q. B. Div. 195. So, where the contract provides in general terms that the goods are to be carried at the owner's risk. *Nashville, etc., R. Co. v. Jackson*, 6 Heisk. (Tenn.) 271; *Canfield v. Baltimore, etc., R. Co.*, 93 N. Y. 532; *Mobile, etc., R. Co. v. Jarboe*, 41 Ala.

644; *D'Arc v. London, etc., R. Co.*, L. R. 9 C. P. 325.

<sup>1</sup> *Menzell v. Railway Co.*, 1 Dillon (U. S. C. C.) 531. Compare *Hiel v. St. Louis, etc., R. Co.*, 16 Mo. App. 363.

<sup>2</sup> *Southern Ex. Co. v. Crook*, 44 Ala. 468. See, also, *Rosenstein v. Missouri Pac. R. Co.*, 16 Mo. App. 225.

<sup>3</sup> *Little Rock, etc., R. Co. v. Talbot*, 39 Ark. 523. See, also, *Barter v. Wheeler*, 49 N. H. 9; *Rio Grande R. Co. v. Cross*, 5 Tex. Civ. App. 454, s. c. 23 S. W. R. 529.

<sup>4</sup> *The Guildhall*, 58 Fed. R. 796; *Hoadley v. Northern Transp. Co.*, 115 Mass. 304.

<sup>5</sup> *Western, etc., R. Co. v. Exposition Cotton Mills*, 81 Ga. 522, s. c. 2 L. R. A. 102; *Liverpool, etc., Co. v. Phoenix Ins. Co.*, 129 U. S. 397, s. c. 9 Sup.

though a statute of the state in which the carrier is chartered prohibits common carriers from limiting their common law liability by any stipulation in a receipt, the statute will not prevent such a limitation in a contract made in another state for transportation to a third state.<sup>1</sup> But where the law of the place in which the contract was made is not pleaded or shown it will be presumed that it is the same as that of the state in which the action is brought,<sup>2</sup> at least where the common law prevails in the latter state. And it seems that there may be exceptions to the general rule, founded upon the supposed intention of the parties, gathered from circumstances surrounding the transaction.<sup>3</sup> Thus, where the contract is made in one state to be wholly performed in another it may be presumed that the parties entered into it with reference to the law of the place of performance and it has been held that the law of that place will govern as to its validity and effect.<sup>4</sup> So, it is a general rule that a contract will not be enforced where it is contrary to the policy and institutions of the state in which it is sought to be enforced,<sup>5</sup> and this rule has sometimes been applied where a contract exempting a carrier from liability for negligence, although valid where made, is

Ct. R. 469; *McDaniel v. Chicago, etc.*, R. Co., 24 Iowa 412; *Pennsylvania Co. v. Fairchild*, 69 Ill. 260; *Fairchild v. Philadelphia, etc.*, R. Co., 148 Pa. St. 527, s. c. 24 Atl. R. 79; *Dyke v. Erie, etc.*, R. Co., 45 N. Y. 113, s. c. 6 Am. R. 43; *Merchants' Dispatch, etc.*, Co. v. *Furthmann*, 149 Ill. 66, s. c. 61 Am. & Eng. R. Cas. 145; *Hudson v. Northern Pac. R. Co.*, (Iowa) 60 N. W. R. 608, 61 Am. & Eng. R. Cas. 329; *Forepaugh v. Delaware, etc.*, R. Co., 128 Pa. St. 217, s. c. 18 Atl. R. 503, 5 L. R. A. 508, *Pacific Exp. Co. v. Foley*, 46 Kan. 457, s. c. 26 Pac. R. 665, 4 Lewis' Am. R. & Corp. R. 365; *In re Missouri, etc.*, Co., L. R. 42 Ch. Div. 321; *Peninsular, etc.*, Co. v. *Shand*, 3 Moore P. C. (N. S.) 272.

But see *Gray v. Jackson*, 51 N. H. 9. See *ante*, 1494.

<sup>1</sup>*Thomas v. Wabash, etc.*, R. Co., 63 Fed. R. 200. See *St. Joseph, etc.*, R. Co. v. *Palmer*, 38 Neb. 463, s. c. 56 N. W. R. 957.

<sup>2</sup>*Palmer v. Atchison, etc.*, R. Co., 101 Cal. 187, s. c. 35 Pac. R. 630. In most states, however, the presumption would be that the common law prevailed in the state in which the contract was made.

<sup>3</sup>*Burnett v. Pennsylvania R. Co.*, (Pa.) 34 Atl. R. 972.

<sup>4</sup>*Ryan v. Missouri R. Co.*, 65 Tex. 13.

<sup>5</sup>See *Clark on Contracts*, 503, 506; *Whart. Conf. L.* 388; *Story Conf. L.* 371, § 244.



contrary to the policy of the country in which the action was brought.<sup>1</sup>

§ 1507. **Powers of agent to agree to limitation.**—We have elsewhere considered the power of the carrier's agents to bind it by contract of carriage.<sup>2</sup> We shall here consider the power of an agent of the owner of goods to bind him by agreeing to a stipulation limiting the liability of the carrier. It may be well to add, however, to what has been said in the former connection, that, according to a very recent decision, a railroad company can not indirectly obtain an exemption from liability for its own negligence by limiting the authority of its agents, and an attempt on its part to limit the power of an agent to make contracts of carriage, within the ordinary scope of his authority, by requiring such a condition to be inserted in the contract is nugatory, especially where the shipper is not notified or chargeable with notice of such limited authority.<sup>3</sup> The agent of the owner of goods, who is authorized by him to deliver them to the carrier for transportation, is presumed to have authority to contract with the carrier for that purpose, and the carrier has a right to assume, in the absence of anything to the contrary, that such agent has authority to bind the owner by any contract such as is ordinarily made for transportation of property of the kind offered for carriage. The owner will, therefore, be bound, in such cases by a just and reasonable stipulation limiting the liability of the carrier in the contract made by such agent to the same extent as if it had been made by himself.<sup>4</sup> But circumstances may some-

<sup>1</sup> *Lallande v. His Creditors*, 42 La. Ann. 705; *The Guildhall*, 58 Fed. R. 796. See, also, *The Brantford City*, 29 Fed. R. 373; *Monroe v. The Iowa*, 50 Fed. R. 561; *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351, 369.

<sup>2</sup> *Ante*, § 1437.

<sup>3</sup> *Baltimore, etc., R. Co. v. McLaughlin*, 73 Fed. R. 519.

<sup>4</sup> *Nelson v. Hudson River R. Co.*, 48 N. Y. 498; *Zimmer v. New York, etc.,*

*R. Co.*, 137 N. Y. 460, s. c. 33 N. E. R. 642; *Armstrong v. Chicago, etc., R. Co.*, 53 Minn. 183, s. c. 54 N. W. R. 1059; *Squire v. New York, etc., R. Co.*, 98 Mass. 239; *Hill v. Boston, etc., R. Co.*, 144 Mass. 284, s. c. 10 N. E. R. 836; *Brown v. Louisville, etc., R. Co.*, 36 Ill. App. 140; *Missouri Pac. R. Co. v. International, etc., Co.*, 84 Tex. 149, s. c. 19 S. W. R. 459; *McCann v. Baltimore, etc., R. Co.*, 20 Md. 202;

times rebut the presumption as to the general authority of the agent to bind the owner by a special contract limiting the liability of the carrier,<sup>1</sup> and a few of the courts seem to deny the rule that an agent authorized to deliver and ship goods will be presumed to have authority to agree to any special contract limiting the carrier's liability, and are inclined to look to the real rather than the apparent authority of the agent.<sup>2</sup>

**§ 1508. Stipulation exempting carrier from liability for loss by fire.**—The carrier may also stipulate for immunity from liability for loss or injury to the freight by fire not caused by its own negligence.<sup>3</sup> Such a contract made in accordance with the general rules already stated, is valid. But such a stipulation will not be construed in any jurisdiction as exempting the carrier from liability for its own negligence unless such a construction is unquestionably required,<sup>4</sup> and in most jurisdic-

*Robinson v. Merchants' Dispatch, etc., Co.*, 45 Iowa 470; *York Co. v. Central R.*, 3 Wall. (U. S.) 107; *Barnett v. London, etc., Ry. Co.*, 5 H. & N. 604; *Aldridge v. Great Western Ry. Co.*, 15 C. B. (N. S.) 582.

<sup>1</sup>*Buckland v. Adams Exp. Co.*, 97 Mass. 124; *Jennings v. Grand Trunk R. Co.*, 127 N. Y. 438, s. c. 5 Lewis' Am. R. & Corp. R. 548; *Fillebrown v. Grand Trunk R. Co.*, 55 Me. 462. In the last case just cited it was held to be a question of fact for the jury to determine under the special circumstances of each particular case. So, in *American Trans. Co. v. Moore*, 5 Mich. 368.

<sup>2</sup>See *Seller v. Steamship Pacific*, 1 Ore. 409; *Merchants' Dispatch, etc., Co. v. Joesting*, 89 Ill. 152; *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, s. c. 12 S. W. R. 815; *Adams Exp. Co. v. Nock*, 2 Div. (Ky.) 562; *Hayes v. Campbell*, 63 Cal. 143. It is argued with some degree of plausibility in several of these cases that the presumption may be that the agent has authority to ship under the common

law liability, but that he can not be presumed to have power to agree to a special contract limiting the carriers' liability. But such contracts were made at common law, and even if they were not, the custom being now almost, if not quite, universal, it is certainly a just presumption that the agent has authority to do what is ordinarily and customarily done in such cases at the present time.

<sup>3</sup>*Smith v. American Express Co.*, (Mich.) 66 N. W. R. 479; *Little Rock, etc., R. Co. v. Daniels*, 49 Ark. 352; *Rand v. Merchants', etc., Transp. Co.*, 59 N. H. 363; *Davis v. Central Vt. R. Co.*, 66 Vt. 290, s. c. 29 Atl. R. 313; *St. Louis, etc., R. Co. v. Bone*, 52 Ark. 26, s. c. 11 S. W. R. 958; *Lancaster Mills v. Merchants', etc., Co.*, 89 Tenn. 1, s. c. 14 S. W. R. 317. Stipulation against liability for fire after unloading held reasonable and valid in *Constable v. National, etc., Co.*, 154 U. S. 51, s. c. 14 Sup. Ct. R. 1062.

<sup>4</sup>*Steinweg v. Erie, etc., R. Co.*, 43 N. Y. 123; *Lamb v. Camden, etc., R. Co.*,

tions the carrier can not contract for an absolute exemption from all liability for loss or injury by fire caused by its own negligence, no matter how strong and comprehensive the language of the contract may be.<sup>1</sup>

§ 1509. *Stipulations as to insurance.*—It is well settled that a carrier may insure the property in its custody even as against loss occasioned by the negligence of its own servants.<sup>2</sup> But it is held in a recent case that a stipulation in a bill of lading that the owner, shipper and consignee shall each cause the goods to be insured and that in case of loss the carrier shall have the benefit of the insurance if such loss “shall occur from any cause which shall be held to render this line or any of its agents liable therefor” is void as attempting to protect the carrier against the consequences of its own negligence and is no defense to an action against the carrier for loss caused by such negligence.<sup>3</sup> In another recent case, however, it was

46 N. Y. 271; *Montgomery, etc., R. Co. v. Edmonds*, 41 Ala. 667; *Maxwell v. Southern Pac. R. Co.*, (La.) 19 So. R. 287; *Thomas v. Lancaster Mills*, 71 Fed. R. 481, and authorities cited on page 486. See, also, *ante*, § 1505.

<sup>1</sup> *McFadden v. Missouri, etc., R. Co.*, 92 Mo. 343; *Thomas v. Lancaster Mills*, 71 Fed. R. 481; *New Orleans, etc., Ins. Co. v. New Orleans, etc., R. Co.*, 20 La. Ann. 302; *Houston, etc., R. Co. v. Davis*, (Tex. Civ. App.) 31 S. W. R. 308; *York Co. v. Central R. Co.*, 3 Wall. (U. S.) 107, *ante*, § 1497.

<sup>2</sup> *Orient Mut. Ins. Co. v. Adams*, 123 U. S. 67, s. c. 8 Sup. Ct. R. 68; *Home Ins. Co. v. Baltimore, etc., Co.*, 93 U. S. 527; *General Mut. Ins. Co. v. Sherwood*, 14 How. (U. S.) 351, 364; *North British, etc., Ins. Co. v. London, etc., Co.*, L. R. 5 Ch. Div. 569; *Walker v. Maitland*, 5 Barn. & Ald. 171; *Copeland v. New England, etc., Co.*, 2 Metc. (Mass.) 432; *British, etc., Ins. Co. v. Gulf, etc., R. Co.*, 63 Tex. 475, s. c. 51 Am. R. 661; *Waters v. Mer-*

*chants', etc., Ins. Co.*, 11 Pet. (U. S.) 213; *Phoenix Ins. Co. v. Erie, etc., Co.*, 10 Biss. 18, 38, affirmed in 117 U. S. 312, s. c. 6 Sup. Ct. R. 750, 1176; *Davidson v. Burnand*, L. R. 4 C. P. 117, 121; *Crowley v. Cohen*, 3 Barn. & Adol. 478; *Minneapolis, etc., R. Co. v. Home Ins. Co.* (Minn.) 66 N. W. R. 132.

<sup>3</sup> *Willock v. Pennsylvania R. Co.*, 166 Pa. St. 184, s. c. 30 Atl. R. 948, 11 Lewis' Am. R. & Corp. R. 642. The court held that the carrier could not compel the shipper to insure for his benefit any more than it could compel him to release it entirely from the consequences of its own negligence, for the reason that it would be contrary to public policy. It is probably true that a stipulation compelling the shipper to insure against the negligence of the carrier for the latter's benefit is invalid, and in this, as well as in other respects, the case just cited may probably be distinguished from other cases which hold that a stipulation

held that the carrier had a right to stipulate for the benefit of such insurance, that it might presume that the shipper's agent had authority to agree thereto, and that such a stipulation should not be held invalid, as not being supported by a consideration, merely because there was no corresponding reduction in freight charges.<sup>1</sup> It seems to us that, as the carrier may lawfully insure the goods itself, even as against loss occasioned by the negligence of its own servants, it may also stipulate that it shall have the benefit of the insurance effected by the shipper, and that where the insurance is afterwards effected upon the goods known to be *in transitu*, in accordance with such a stipulation, the insurance company, in the absence of fraud or concealment, can not defend upon the ground that such a stipulation is invalid,<sup>2</sup> and is not entitled, after payment of the loss, to be subrogated to the rights of the shipper to recover over against the carrier, unless the assured could do so.<sup>3</sup> The carrier, however, is primarily liable, and the insurance company, having paid the loss, is entitled to be sub-

that the carrier shall have the benefit of any insurance which may be effected is valid. See *Inman v. South Carolina R. Co.*, 129 U. S. 128, s. c. 9 Sup. Ct. R. 249.

<sup>1</sup>*Missouri Pac. R. Co. v. International, etc., Ins. Co.*, 84 Tex. 149, s. c. 19 S. W. R. 459. But it is held by the same court that a provision that the carrier shall have the benefit of any insurance effected by the shipper does not cover a loss by the carrier's negligence where the policy expressly provides that it shall not cover the carrier's common law liability. *Gulf, etc., R. Co. v. Zimmerman*, 81 Tex. 605. See, also, *Liverpool, etc., R. Co. v. Phoenix Ins. Co.*, 129 U. S. 397, s. c. 9 Sup. Ct. R. 469.

<sup>2</sup>*Tate v. Hyslop*, L. R. 15 Q. B. Div. 368, 375; *Jackson Co. v. Boylston, etc., Ins. Co.*, 139 Mass. 508, s. c. 52 Am. R. 728; *Phoenix, etc., Ins. Co. v.*

*Erie, etc., Co.*, 117 U. S. 312, s. c. 6 Sup. Ct. R. 750, 1176.

<sup>3</sup>*Jackson Co. v. Boylston, etc., Ins. Co.*, 139 Mass. 508, s. c. 52 Am. R. 728; *Mercantile Mut. Ins. Co. v. Callebs*, 20 N. Y. 173; *Platt v. Richmond, etc., R. Co.*, 108 N. Y. 358; *Phoenix Ins. Co. v. Erie, etc., Co.*, 117 U. S. 312, s. c. 6 Sup. Ct. R. 750, 1176; *St. Louis, etc., R. Co. v. Commercial, etc., Ins. Co.*, 139 U. S. 223, s. c. 11 Sup. Ct. R. 554; *Providence Ins. Co. v. Morse*, 150 U. S. 99, s. c. 14 Sup. Ct. R. 55. The validity of such a stipulation, even where the loss is occasioned by the carrier's negligence, is clearly shown in *Rintoul v. New York, etc., R. Co.*, 17 Fed. R. 905. So, in *British, etc., Ins. Co. v. Gulf, etc., R. Co.*, 63 Tex. 475, s. c. 51 Am. R. 661, where it is held that such a stipulation is not forbidden by a statute prohibiting carriers from limiting their common law liability.

rogated to the rights of the assured against the carrier where there is no valid stipulation or agreement, such as that to which we have referred, giving the carrier the benefit of the insurance and thus limiting the right of the shipper and the insurance company.<sup>1</sup> So, if the policy of insurance was already in force at the time the bill of lading was executed the shipper and the carrier can not by any agreement of their own deprive the insurance company of its rights,<sup>2</sup> and if it pays the loss under a policy which provides that it shall be released from liability in case of any agreement made between the insured and any carrier whereby the latter is to have the benefit of the insurance, such company may at the same time impose as a condition of such payment that it shall have the right to proceed against the carrier with which the shipper has made such an agreement.<sup>3</sup>

§ 1510. **Stipulation as to value and amount of damages.**—The general rule is well established by the weight of modern authority, in accordance with reason, that a fair *bona fide* valuation of goods as a basis for the carrier's charges is binding upon the shipper and that a valid contract may be made limiting the liability of the carrier to that sum where it is supported by a sufficient consideration, such as a reduced rate of freight.<sup>4</sup> There can be no question, we think, as to the justice

<sup>1</sup>Hall v. Railroad Co., 13 Wall. (U. S.) 367; Mobile, etc., R. Co. v. Jurey, 111 U. S. 584, s. c. 4 Sup. Ct. R. 566; Providence Ins. Co. v. Morse, 150 U. S. 99, s. c. 14 Sup. Ct. R. 55; Louisville, etc., R. Co. v. Manchester Mills, 88 Tenn. 653, s. c. 14 S. W. R. 314; Home Ins. Co. v. Western Transp. Co., 4 Rob. (N. Y.) 257; Phillips on Insurance, 1723.

<sup>2</sup>Inman v. South Carolina R. Co., 129 U. S. 128, s. c. 9 Sup. Ct. R. 249; Carstairs v. Mechanics', etc., Ins. Co., 18 Fed. R. 473; Insurance Co. of North America v. Easton, 73 Tex. 167, s. c. 3 L. R. A. 424. Such an agreement made after the execution of the

policy will generally invalidate the policy, at least where it contains a provision to that effect or a warranty against such agreements.

<sup>3</sup>Southard v. Minneapolis, etc., R. Co., 60 Minn. 382, s. c. 62 N. W. R. 442, 619, 61 Am. & Eng. R. Cas. 282. Compare Lancaster Mills v. Merchants' Cotton Press Co., 89 Tenn. 1, s. c. 14 S. W. R. 317, and Missouri Pac. R. Co. v. International, etc., Ins. Co., 84 Tex. 149, s. c. 19 S. W. R. 459.

<sup>4</sup>Hill v. Boston, etc., R. Co., 144 Mass. 284, s. c. 10 N. E. R. 836; Graves v. Lake Shore, etc., R. Co., 137 Mass. 33, s. c. 50 Am. R. 282; Squire v. New York Cent. R. Co., 98

of the rule as above stated. Where, however, the valuation is an arbitrary one made by the carrier, or the latter thus seeks to escape liability for its own negligence beyond the amount fixed, and such amount is obviously much less than the true value of the goods, a different question arises. An arbitrary and unreasonable limitation inserted in a bill of lading by the carrier, without any request or notice to the shipper and without consideration or an opportunity to obtain a lower rate of freight in consideration thereof, is not binding upon the shipper.<sup>1</sup> Some of the authorities cited in support of this proposition go still further and seem to hold that the valuation must be made by the shipper, but there is conflict upon this point, and it is held in a leading case and others which follow it, that it is immaterial whether the shipper fixes the value or not, so long as he agrees to it by accepting the bill of lading without objection.<sup>2</sup> The most stubborn conflict among the authorities, however, is upon the question of the validity and effect of such a valuation and limitation where the carrier is guilty of negligence. But we believe that most of the apparently conflicting decisions can be reconciled in accordance with the following rules. 1. A *bona fide* contract,

Mass. 239, s. c. 93 Am. Dec. 162; Hart v. Pennsylvania R. Co., 112 U. S. 331, s. c. 5 Sup. Ct. R. 151; South, etc., R. Co. v. Henlein, 52 Ala. 606, s. c. 23 Am. R. 578; Durgin v. American Exp. Co., 66 N. H. 277, s. c. 20 Atl. R. 328, 9 L. R. A. 453; Louisville, etc., R. Co. v. Sherrod, 84 Ala. 178; Louisville, etc., R. Co. v. Oden, 80 Ala. 38; Richmond, etc., R. Co. v. Payne, 86 Va. 481, s. c. 10 Atl. R. 749, 6 L. R. A. 849; Belger v. Dinsmore, 51 N. Y. 166, s. c. 10 Am. R. 575; St. Louis, etc., R. Co. v. Weakly, 50 Ark. 397, s. c. 7 Am. St. R. 104; Brown v. Wabash, etc., R. Co., 18 Mo. App. 568; Harvey v. Terre Haute, etc., R. Co., 74 Mo. 538; Earnest v. Express Co., 1 Woods (U. S. C. C.) 573.

<sup>1</sup> Rosenfeld v. Peoria, etc., R. Co.,

103 Ind. 121, s. c. 53 Am. R. 500; Chicago, etc., R. Co. v. Chapman, 133 Ill. 96, s. c. 23 Am. St. R. 587, and note, 8 L. R. A. 508; Moulton v. St. Paul, etc., R. Co., 31 Minn. 85, s. c. 47 Am. R. 781; Kellerman v. Kansas City, etc., R. Co., (Mo.) 34 S. W. R. 41; McFadden v. Missouri Pacific R. Co., 92 Mo. 343, s. c. 1 Am. St. R. 721; Georgia Pac. R. Co. v. Hughtart, 90 Ala. 36, s. c. 8 So. R. 62; Louisville, etc., R. Co. v. Sherrod, 84 Ala. 178; Kansas City, etc., R. Co. v. Simpson, 30 Kan. 645, s. c. 46 Am. R. 104; San Antonio, etc., R. Co. v. Barnett, (Tex. Civ. App.) 34 S. W. R. 139.

<sup>2</sup> Hart v. Pennsylvania R. Co., 112 U. S. 331, s. c. 5 Sup. Ct. R. 151.

fairly made, in advance, upon sufficient consideration, fixing the value of the property or the rule for ascertaining its value in case of loss or injury, even if the carrier is guilty of negligence, is valid and enforceable, and, if based upon a lower rate of freight in proportion to the decreased liability, "will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuation."<sup>1</sup> 2. A stipulation arbitrarily limiting the amount of recovery, in case of the negligence of the carrier, without regard to the value of the property is invalid,<sup>2</sup> except, perhaps, in the few ju-

<sup>1</sup>Hart v. Pennsylvania R. Co., 112 U. S. 331, s. c. 5 Sup. Ct. R. 151; Graves v. Lake Shore, etc., R. Co., 137 Mass. 33; Hill v. Boston, etc., R. Co., 144 Mass. 284, s. c. 10 N. E. R. 836; Alair v. Northern Pac. R. Co., 53 Minn. 160, s. c. 54 N. W. R. 1072, s. c. 8 Lewis' Am. R. & Corp. R. 445, and valuable note by Mr. Lewis; The Hadji, 18 Fed. R. 459; The Lydian Monarch, 23 Fed. R. 298; Rogan v. Wabash R. Co., 51 Mo. App. 665; Coupland v. Housatonic R. Co., 61 Conn. 531, s. c. 23 Atl. R. 870; Ballou v. Earle, 17 R. I. 441, s. c. 22 Atl. R. 1113, 14 L. R. A. 433, and note; Louisville, etc., R. Co. v. Oden, 80 Ala. 38; Elkins v. Empire Transp. Co., 81½ Pa. St. 315; Durgin v. American Exp. Co., 66 N. H. 277, s. c. 20 Atl. R. 328; Louisville, etc., R. Co. v. Sowell, 90 Tenn. 17, s. c. 15 S. W. R. 837; Zimmer v. New York, etc., R. Co., 137 N. Y. 460, s. c. 33 N. E. R. 642; Starnes v. Louisville, etc., R. Co., 91 Tenn. 516, s. c. 19 S. W. R. 675. See, also, authorities cited at the end of the next note *infra*. But compare Galveston, etc., R. Co. v. Ball, 80 Tex. 602, s. c. 16 S. W. R. 441; Shea v. Minneapolis, etc., R. Co., (Minn.) 65 N. W. R. 458; Grogan v. Adams Exp. Co., 114 Pa. St. 523;

Galt v. Adams Exp. Co., McArthur & M. 124, s. c. 48 Am. R. 742. Such a contract is not in any proper sense a contract primarily against liability for negligence. The carrier has a right to be compensated according to the value of the property, and if the shipper, to obtain a lower rate of freight, fixes that value at less than it really is, it is his own fault, and the fact that, incidentally the effect may be to lessen the liability of the carrier for its own negligence can make no difference. Any other rule would be to encourage bad faith and dishonest dealing on the part of the shipper.

<sup>2</sup>Abrams v. Milwaukee, etc., R. Co., 87 Wis. 485, s. c. 58 N. W. R. 780; Chicago, etc., R. Co. v. Witty, 32 Neb. 275, s. c. 49 N. W. R. 183; Chicago, etc., R. Co. v. Chapman, 133 Ill. 96, s. c. 24 N. E. R. 417, 23 Am. St. R. 587 and note; Eells v. St. Louis, etc., R. Co., 52 Fed. R. 903; Moulton v. St. Paul, etc., R. Co., 31 Minn. 85; Railway Co. v. Wynn, 88 Tenn. 320, s. c. 3 Lewis' Am. R. & Corp. R. 13; Boscowitz v. Adams Exp. Co., 93 Ill. 523; United States Exp. Co. v. Backman, 28 Ohio St. 144; Adams Exp. Co. v. Hoeing, 88 Ky. 373; Nickey v. St. Louis, etc., R. Co.,

risdictions in which a carrier can contract for an exemption from liability for its own negligence. 3. The agreement as to value must be made in good faith and not forced upon the shipper by unreasonable rates for a higher valuation.<sup>1</sup> 4. A carrier may make reasonable regulations, graduating its compensation according to the value of the property and requiring a disclosure of such value for the purpose of fixing its compensation, and providing that, in case of the failure of the shipper to disclose the value as required, it shall be deemed not to exceed a certain specified sum.<sup>2</sup> 5. If the shipper, upon inquiry duly made by the carrier as to the value of the goods, gives a false valuation, in order to obtain reduced rates, and deceives the carrier thereby, he will be estopped by his

35 Mo. App. 79; *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, s. c. 12 S. W. R. 815; *Baltimore, etc., R. Co. v. Ragsdale*, (Ind. App.) 42 N. E. R. 1106; *Louisville, etc., R. Co. v. Owens*, 93 Ky. 201, 19 S. W. R. 590; *Weiller v. Pennsylvania R. Co.*, 134 Pa. St. 310, s. c. 19 Atl. R. 702; *Chicago, etc., R. Co. v. Abels*, 60 Miss. 1017; *Kember v. Southern Exp. Co.*, 22 La. Ann. 158, s. c. 2 Am. R. 719; *Georgia, etc., R. Co. v. Hughart*, 90 Ala. 36. But see *Richmond, etc., R. Co. v. Payne*, 86 Va. 481, s. c. 10 S. E. R. 749, 1 Lewis' Am. R. & Corp. R. 475; *Johnstone v. Richmond, etc., R. Co.*, 39 S. Car. 55, s. c. 17 S. E. R. 512; *Zouch v. Chesapeake, etc., R. Co.*, 36 W. Va. 524, s. c. 15 S. E. R. 185; *Western R. Co. v. Harwell*, 91 Ala. 340, s. c. 8 So. R. 649, in all of which the distinction we have sought to make is recognized, but the limitation was held valid on the ground that agreeing to the amount of liability was in effect agreeing to the value.

<sup>1</sup>*Overland, etc., Co. v. Carroll*, 7 Colo. 43; *Louisville, etc., R. Co. v.*

*Sherrod*, 84 Ala. 178, s. c. 4 So. R. 29; *Louisville, etc., R. Co. v. Gilbert*, 88 Tenn. 430, s. c. 1 Lewis' Am. R. & Corp. R. 468; *Harrison v. London, etc., R. Co.*, 2 Best & S. 122; *Wilson v. Freeman*, 3 Camp. 527. See, also, *ante*, p. 2326, note 5.

<sup>2</sup>*Graves v. Lake Shore, etc., R. Co.*, 137 Mass. 33; *Duntley v. Boston, etc., R. Co.*, 66 N. H. 263, s. c. 20 Atl. R. 327, 3 Lewis' Am. R. & Corp. R. 259; *St. Louis, etc., R. Co. v. Weakly*, 50 Ark. 397, s. c. 7 Am. St. R. 104; *Newburger v. Howard & Co's Express*, 6 Phila. (Pa.) 174; *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, s. c. 5 Sup. Ct. R. 151; *Oppenheimer v. United States Exp. Co.*, 69 Ill. 62; *Lawrence v. New York, etc., R. Co.*, 36 Conn. 63; *Boorman v. American Exp. Co.*, 21 Wis. 152; *Brehme v. Adams Exp. Co.*, 25 Md. 328; *Magnin v. Dinsmore*, 62 N. Y. 35, s. c. 20 Am. R. 442; *Pacific R. Co. v. Foley*, 46 Kan. 457, s. c. 26 Pac. R. 665; *Calderon v. Atlas Steamship Co.*, 64 Fed. R. 874. But see *Conover v. Pacific Exp. Co.*, 40 Mo. App. 31.



fraud from claiming and recovering any greater amount in case they are lost or injured.<sup>1</sup>

§ 1511. **Stipulation exempting carrier from liability in case of live stock.**—A carrier may contract with the owner of live stock against liability for losses arising from the inherent nature, vice or propensity of the animals themselves and not from its own negligence in running its trains or the like. Such a contract, especially where the owner or his agent goes with the animals to take care of and load and unload them, may exempt the carrier from liability for injury to the animals from overloading, suffocation, heat, or any like cause apart from the negligence of the carrier or its servants.<sup>2</sup> But, according to the weight of authority, it can not thus obtain an exemption from liability for its own negligence in regard to any duty which it owes as a common carrier.<sup>3</sup> So, it has been held that

<sup>1</sup>Chicago, etc., R. Co. v. Shea, 66 Ill. 471; Hayes v. Wells, Fargo Co., 23 Cal. 185, s. c. 83 Am. Dec. 89; Rosenfeld v. Peoria, etc., R. Co., 103 Ind. 121, s. c. 53 Am. R. 500; Harvey v. Terre Haute, etc., R. Co., 74 Mo. 538; McCance v. London, etc., R. Co., 7 Hurl. & N. 477; Ballou v. Earle, 17 R. I. 441, s. c. 22 Atl. R. 1113; Shackt v. Railroad Co., 94 Tenn. 658, s. c. 30 S. W. R. 742. Failure to disclose the value has, however, been held not to be fraud upon the carrier, under ordinary circumstances, where no inquiry is made. Railroad Co. v. Fraloff, 100 U. S. 24; Southern Exp. Co. v. Crook, 44 Ala. 468, s. c. 4 Am. R. 140; Chicago, etc., R. Co. v. Chapman, 133 Ill. 96, s. c. 24 N. E. R. 417, 23 Am. St. R. 587. But see Duntley v. Boston, etc., R. Co., 66 N. H. 263, s. c. 20 Atl. R. 327, 3 Lewis' Am. R. & Corp. R. 259; Magnin v. Dinsmore, 62 N. Y. 35.

<sup>2</sup>Georgia R. Co. v. Beatie, 66 Ga. 438, s. c. 42 Am. R. 75; Georgia R. Co. v. Spears, 66 Ga. 485; Central R., etc., Co. v. Smitha, 85 Ala. 47, s. c. 4

So. R. 708; Illinois Cent. R. Co. v. Scruggs, 69 Miss. 418, s. c. 13 So. R. 698; Texas, etc., R. Co. v. Davis, 2 Tex. App. (Civil Cases) 156; Betts v. Farmers' Loan & T. Co., 21 Wis. 80; Morrison v. Phillips Constr. Co., 44 Wis. 405; Lake Shore, etc., R. Co. v. Bennett, 89 Ind. 457, s. c. 6 Am. & Eng. R. Cas. 391; Atchison v. Chicago, etc., R. Co., 80 Mo. 213.

<sup>3</sup>Moulton v. St. Paul, etc., R. Co., 31 Minn. 85; East Tenn., etc., R. Co. v. Johnston, 75 Ala. 596, s. c. 51 Am. R. 489; Chicago, etc., R. Co. v. Witty, 32 Neb. 275, s. c. 49 N. W. R. 183; Indianapolis, etc., R. Co. v. Allen, 31 Ind. 394; Welch v. Boston, etc., R. Co., 41 Conn. 333; Baughman v. Louisville, etc., R. Co., 94 Ky. 150, 21 S. W. R. 757; Welsh v. Pittsburg, etc., R. Co., 10 Ohio St. 65; Gulf, etc., R. Co. v. Wilhelm, 3 Tex. App. (Civil Cases) 558; Powell v. Pennsylvania R. Co., 32 Pa. St. 414; Virginia, etc., R. Co. v. Sayers, 26 Gratt. (Va.) 328; Atchison, etc., R. Co. v. Ditmars, (Kan. App.) 43 Pac. R. 833.

it can not contract against liability for loss on account of delay thus caused,<sup>1</sup> nor for an exemption from liability for injuries to animals caused by its failure to furnish suitable cars or facilities for loading, unloading, watering and feeding them.<sup>2</sup>

§ 1512. Stipulations as to manner and time of presenting claims.—A valid contract may be made requiring claims for loss or damage to freight to be presented in a certain manner or within a certain time, provided it is reasonable.<sup>3</sup> So, stipulations requiring suit to be brought within a specified time, less than the statute of limitations, have been upheld.<sup>4</sup>

<sup>1</sup> *Ormsby v. Union Pac. R. Co.*, 4 Fed. R. 706; *Ball v. Wabash, etc., R. Co.*, 83 Mo. 574. But see *Bartlett v. Pittsburgh, etc., R. Co.*, 94 Ind. 281, s. c. 18 Am. & Eng. R. Cas. 549.

<sup>2</sup> *Chesapeake, etc., R. Co. v. American Exch. Bank*, (Va.) 23 S. E. R. 935; *Norfolk, etc., R. Co. v. Harman*, 91 Va. 601, s. c. 22 S. E. R. 490; *Taylor, etc., R. Co. v. Montgomery*, (Tex. App.) 16 S. W. R. 178; *Rhodes v. Louisville, etc., R. Co.*, 9 Bush, (Ky.) 688; *Kansas City, etc., R. Co. v. Holland*, 68 Miss. 351, s. c. 8 So. R. 516; *Nashville, etc., R. Co. v. Heggie*, 86 Ga. 210, s. c. 12 S. E. R. 363; *St. Louis, etc., R. Co. v. Lesser*, 46 Ark. 236. But see *Myers v. Wabash, etc., R. Co.*, 90 Mo. 98, s. c. 2 S. W. R. 263; *Hood v. Grand Trunk R. Co.*, 20 U. Can. C. P. 361. See as to effect of §§ 4386 and 4387 Rev. St. U. S., Ft. Worth, etc., *R. Co. v. Daggett*, 87 Tex. 322, s. c. 28 S. W. R. 525; *Nashville, etc., R. Co. v. Heggie*, 86 Ga. 210, s. c. 12 S. E. R. 363; *Missouri Pac. R. Co. v. Texas, etc., R. Co.*, 41 Fed. R. 913; *Hale v. Missouri Pac. R. Co.*, 36 Neb. 266, s. c. 54 N. W. R. 517.

<sup>3</sup> *Express Company v. Caldwell*, 21 Wall. (U. S.) 264; *Chicago, etc., R. Co. v. Simms*, 18 Ill. App. 68; *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, s.

c. 15 S. W. R. 568; *Black v. Wabash, etc., R. Co.*, 111 Ill. 351; *United States Ex. Co. v. Harris*, 51 Ind. 127; *Owen v. Louisville, etc., R. Co.*, 87 Ky. 626; *Armstrong v. Chicago, etc., R. Co.*, 53 Minn. 183, s. c. 54 N. W. R. 1059; *Atchison, etc., R. Co. v. Temple*, 47 Kan. 7, s. c. 27 Pac. R. 98; *Rice v. Kansas Pac. R. Co.*, 63 Mo. 314; *Southern Ex. Co. v. Hunnicutt*, 54 Miss. 566; *Jennings v. Grand Trunk R. Co.*, 127 N. Y. 438, s. c. 5 Lewis' Am. R. & Corp. R. 548; *Bennett v. Northern Pac. R. Co.*, 12 Ore. 49; *Selby v. Wilmington, etc., R. Co.*, 113 N. Car. 588, s. c. 18 S. E. R. 88.

<sup>4</sup> *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89, s. c. 14 S. W. R. 913; *McCarty v. Gulf, etc., Co.*, 79 Tex. 33, s. c. 15 S. W. R. 164; *Gulf, etc., R. Co. v. Trawick*, 68 Tex. 314; *Thompson v. Chicago, etc., R. Co.*, 22 Mo. App. 321; *Central Vermont R. Co. v. Soper*, 59 Fed. R. 879. But see *Gulf, etc., R. Co. v. Hune*, 87 Tex. 211, 27 S. W. R. 110, and *Galveston, etc., R. Co. v. Herring*, (Tex.) 36 S. W. R. 129, in which it is held that under the Texas act of March 4, 1891, no contract can be made, even in case of an interstate shipment, limiting the time for bringing suit to less than two years.

In many of the cases cited the claim was also required to be presented in writing, and in one case it was held that a stipulation that it should be verified was valid.<sup>1</sup> Like other stipulations of a similar nature, however, it must be fairly made and agreed to, without extortion,<sup>2</sup> and must be reasonable as applied to the facts of the particular case in order to be enforced. If the circumstances are such that the loss or damage can not, by the exercise of reasonable diligence, be discovered within the time limited, the presentation of the claim within a reasonable time thereafter will be sufficient;<sup>3</sup> and, indeed, it has been held that, if the stipulation is unreasonable as applied to the circumstances of the particular case, no notice at all is necessary.<sup>4</sup> Provisions requiring claims to be presented within three,<sup>5</sup> five,<sup>6</sup> ten,<sup>7</sup> thirty<sup>8</sup> and ninety<sup>9</sup> days from the date of the receipt of the goods, or the unloading of the stock, have

<sup>1</sup> *Brown v. Wabash, etc., R. Co.*, 18 Mo. App. 568.

<sup>2</sup> *Atchison, etc., R. Co. v. Dill*, 48 Kan. 210, s. c. 29 Pac. R. 148.

<sup>3</sup> *Western R. Co. v. Harwell*, 91 Ala. 340, s. c. 8 So. R. 649, 45 Am. & Eng. R. Cas. 358; *Memphis, etc., R. Co. v. Holloway*, 9 Baxter 188; *Glenn v. Southern Ex. Co.*, 86 Tenn. 594, s. c. 8 S. W. R. 152. See, also, *Rice v. Kansas Pac. R. Co.*, 63 Mo. 314; *Atchison, etc., R. Co. v. Temple*, 47 Kan. 7, s. c. 27 Pac. R. 98; *Ghormley v. Dinsmore*, 51 N. Y. Super. Ct. 196; *Louisville, etc., R. Co. v. Steele*, 6 Ind. App. 183; *Harned v. Missouri Pac. R. Co.*, 51 Mo. App. 482; *Wichita, etc., R. Co. v. Koch*, 47 Kan. 753, s. c. 28 Pac. R. 1013.

<sup>4</sup> *Jennings v. Grand Trunk, etc., R. Co.*, 127 N. Y. 438, s. c. 5 Lewis' Am. R. & Corp. R. 548; *Ormsby v. Union Pac. R. Co.*, 2 McCrary 48, s. c. 4 Fed. R. 706; *Baltimore, etc., R. Ex. Co. v. Cooper*, 66 Miss. 558, s. c. 40 Am. & Eng. R. Cas. 97. In *Texas, etc., R.*

*Co. v. Adams*, 78 Tex. 372, s. c. 14 S. W. R. 666, it was held a question of fact for the jury to determine whether the time limited was reasonable under the circumstances, but as we shall hereafter see the courts have frequently decided the reasonableness or unreasonableness of such a stipulation in general as a matter of law.

<sup>5</sup> *Oxley v. St. Louis, etc., R. Co.*, 65 Mo. 629; *Lewis v. Great Western R. Co.*, 5 H. & N. 867.

<sup>6</sup> *Black v. Wabash, etc., R. Co.*, 111 Ill. 351; *Dawson v. St. Louis, etc., R. Co.*, 76 Mo. 514; *Pavitt v. Lehigh, etc., R. Co.*, 153 Pa. St. 302, s. c. 25 Atl. R. 1107.

<sup>7</sup> *Case v. Cleveland, etc., R. Co.*, 11 Ind. App. 517, s. c. 39 N. E. R. 426.

<sup>8</sup> *Southern Ex. Co. v. Glenn*, 16 Lea (Tenn.) 472; *Weir v. Express Co.*, 5 Phila. (Pa.) 355; *United States Ex. Co. v. Harris*, 51 Ind. 127.

<sup>9</sup> *Express Company v. Caldwell*, 21 Wall. (U. S.) 264.

been held reasonable, and so has a stipulation requiring written notice of the claim to be given before the stock was removed at the place of destination and mingled with other stock.<sup>1</sup> But similar provisions have been held unreasonable in other cases where the shipment was for a great distance and the claim was required to be presented at the place of shipment within the time limited from the date of the contract,<sup>2</sup> or where the company had no agent of the class specified at the place where the notice was required to be given to such an agent.<sup>3</sup> There is much apparent, and some real, conflict among the authorities, and so much depends upon the circumstances of each particular case that no general rule of any great value can be laid down. If the loss or damage can be discovered and the claim presented by the exercise of reasonable diligence within twenty-four hours, we believe that even so short a time as that would not necessarily be unreasonable; but if the loss or damage could not be discovered within that time, or if there is no agent present to whom notice can be given, or if it has to be given at the place of shipment, a long distance away, or the like, a much longer time than twenty-four hours would be insufficient and unreasonable, especially when it begins to run from the date of the contract rather than from the time the goods are delivered at their destination. In some jurisdictions the burden of proving the reasonableness of such a stipulation is upon the carrier, and it is held that the plaintiff need not allege or prove that he duly presented his claim nor give any excuse for failing to do so;<sup>4</sup> but in some

<sup>1</sup> *Selby v. Wilmington, etc., R. Co.*, 113 N. Car. 588, s. c. 18 S. E. R. 88; *Goggin v. Kansas Pac. R. Co.*, 12 Kan. 416; *Owen v. Louisville, etc., R. Co.*, 87 Ky. 626; *Rice v. Kansas Pac. R. Co.*, 63 Mo. 314; *Sprague v. Missouri Pac. R. Co.*, 34 Kan. 347; *Wichita, etc., R. Co. v. Koch*, 47 Kan. 753, s. c. 28 Pac. R. 1013. But see *Ormsby v. Union Pac. R. Co.*, 4 Fed. R. 706.

<sup>2</sup> *Adams Ex. Co. v. Reagan*, 29 Ind.

21; *Southern Ex. Co. v. Bank of Tupelo, (Ala.)* 18 So. R. 664; *Southern Ex. Co. v. Caperton*, 44 Ala. 101; *Porter v. Southern Ex. Co.*, 4 S. Car. 135; *Pacific Ex. Co. v. Darnell, (Tex.)* 6 S. W. R. 765; *Central Vermont R. Co. v. Soper*, 59 Fed. R. 879.

<sup>3</sup> *Good v. Galveston, etc., R. Co.*, (Tex.) 11 S. W. R. 854, 40 Am. & Eng. R. Cas. 98; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166.

<sup>4</sup> *Ft. Worth, etc., R. Co. v. Great-*

other jurisdictions such a stipulation is regarded as a condition precedent, even when not expressly so declared, and performance thereof must be alleged and proved by the plaintiff, or a good excuse shown for failing to present the claim as required.<sup>1</sup>

§ 1513. **Miscellaneous stipulations.**—We have considered the most important stipulations limiting the liability of the carrier which are usually found in bills of lading or other special contracts, but there are others which have also been adjudged to be valid. Thus, it has been held that a carrier may stipulate against liability for loss by thieves or robbers where its own negligence has in no way occasioned the loss.<sup>2</sup> So, it may stipulate that it shall not be liable for delay caused by strikes or mobs, at least where they are not caused by its own fault and are of such magnitude as to require military force to overcome them.<sup>3</sup> Liability from “leakage” or “breakage” may also be provided against if the carrier is free from negligence.<sup>4</sup> And the carrier is not liable for loss caused by the breaking of an axle without its fault, where the special contract exempts it from liability for any loss caused by any “accident to machinery.”<sup>5</sup>

house, 82 Tex. 104, s. c. 17 S. W. R. 834; *St. Louis, etc., R. Co. v. Hays*, (Tex. Civ. App.) 35 S. W. R. 476; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166; *Gulf, etc., R. Co. v. Vaughn*, 4 Tex. App. (Civil Cases) 269, s. c. 16 S. W. R. 775; *Wescott v. Fargo*, 61 N. Y. 542.

<sup>1</sup> *United States Ex. Co. v. Harris*, 51 Ind. 127; *Louisville, etc., R. Co. v. Widman*, 10 Ind. App. 92; *Case v. Cleveland, etc., R. Co.*, 11 Ind. App. 517; *Chicago, etc., R. Co. v. Simms*, 18 Ill. App. 68. This seems to us the better rule where the stipulation is clearly a condition precedent, at least when the plaintiff sues on the contract which contains it.

<sup>2</sup> *The Saratoga*, 20 Fed. R. 869;

*Lang v. Pennsylvania R. Co.*, 154 Pa. St. 342, s. c. 20 L. R. A. 360; *Spinetti v. Atlas Steamship Co.*, 80 N. Y. 71; *Shaw v. Great Western R. Co.*, L. R. (1894) 1 Q. B. 373. But compare *De Rothschild v. Royal, etc., Steam Packet Co.*, 7 Exch. 734; *Taylor v. Liverpool, etc., Steam Co.*, L. R., 9 Q. B. 546.

<sup>3</sup> *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89, s. c. 14 S. W. R. 913; *Hall v. Pennsylvania R. Co.*, 14 Phila. (Pa.) 414.

<sup>4</sup> *The Barracouta*, 39 Fed. R. 288; *Marx v. The Britannia*, 34 Fed. R. 906; *Hill v. Sturgeon*, 28 Mo. 323; *Lawson on Contracts of Carriage*, § 184.

<sup>5</sup> *Fairbanks & Co. v. Cincinnati, etc., R. Co.*, 66 Fed. R. 471.

§ 1514. **Waiver of stipulation limiting liability or fixing time and manner of presenting claims.**—A stipulation limiting the liability of the carrier or fixing the time and manner of giving notice or presenting claims may be waived by the carrier impliedly, by conduct, as well as expressly.<sup>1</sup> Thus where a claim is received and acted upon, after the expiration of the time limited, without any objection on that account, the carrier may be deemed to have waived the benefit of the limitation as to the time for presenting it.<sup>2</sup> So, although it is required to be in writing, receiving and acting or promising to act upon a verbal claim, without objection on that account, will operate as a waiver of such requirement.<sup>3</sup> And a stipulation limiting the liability of the carrier to a certain sum is waived where the carrier, in adjusting the damages, agrees to take the property and pay the shipper a larger sum than that stated in the contract limiting its liability.<sup>4</sup> But it has been held that a shipper has no right to rely upon the promise of a station agent to waive a provision as to the time within which suit must be brought where he knows that such agent has no authority to adjust the claim without first obtaining the consent of the company.<sup>5</sup>

§ 1515. **Benefit of exemption lost by deviation.**—The carrier may lose the benefit of an exemption from liability, or lim-

<sup>1</sup> *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, s. c. 16 S. W. R. 441; *Hess v. Missouri Pac. R. Co.*, 40 Mo. App. 202; *Merrill v. American Exp. Co.*, 62 N. H. 514; *Glenn v. Southern Exp. Co.*, 86 Tenn. 594; *Hudson v. Northern Pac. R. Co.*, (Iowa) 60 N. W. R. 608.

<sup>2</sup> *International, etc., R. Co. v. Underwood*, 62 Tex. 21; *Hudson v. Northern Pac. R. Co.*, (Iowa) 60 N. W. R. 608, 61 Am. & Eng. R. Cas. 329. So, of course, where the carrier knows of the loss and the delay is caused by the promise of the carrier to pay the claim, and the shipper is thus induced to refrain from fil-

ing it or bringing suit until after the time limited. *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602; *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270; *Peoria, etc., Ins. Co. v. Hall*, 12 Mich. 202.

<sup>3</sup> *Bennett v. Northern Pac. Exp. Co.*, 12 Ore. 49; *Rice v. Kansas Pac. R. Co.*, 63 Mo. 314; *Atchison, etc., R. Co. v. Temple*, 47 Kan. 7, s. c. 27 Pac. R. 98; *Wabash R. Co. v. Brown*, 152 Ill. 484, s. c. 39 N. E. R. 273 (verification waived).

<sup>4</sup> *Chicago, etc., R. Co. v. Katzenbach*, 118 Ind. 174.

<sup>5</sup> *Gulf, etc., R. Co. v. Brown*, (Tex. Civ. App.) 24 S. W. R. 918.

itation thereof, by deviation as well as by a waiver in other ways. We have already considered the liability of the carrier for delay or loss occasioned by deviation irrespective of its effect on the stipulation exempting the carrier from liability. If the deviation in no way occasions the loss it would seem that the carrier ought not to be held liable for a loss clearly within the terms of a valid exemption, but it is doubtful whether the law makes any such distinction. The contract is an entirety, and if the carrier desires the benefit of the exemption it is not unreasonable to hold that all the conditions of the contract should be performed by the carrier on its part. The general rule, therefore, is that, during the deviation at least, the carrier loses the benefit of its exemption by special contract and is subject to the common law liability of such carriers for losses then occurring.<sup>1</sup> This is certainly just, where the loss would not have occurred except for an unnecessary and unjustifiable deviation.

§ 1516. **Burden of proof.**—It frequently becomes of the utmost importance, where the carrier claims that its liability is limited by special contract, to determine upon whom rests the burden of proof. Upon some phases of this subject there is sharp conflict among the authorities. Two propositions, however, seem to be pretty well settled. Proof of loss or non-delivery or injury to freight while in the possession of the carrier usually raises a presumption of negligence or fault on its part and casts the burden upon the carrier to explain or account for the same in some way which will exonerate it,<sup>2</sup> and, if the carrier

<sup>1</sup> *Maghee v. Camden, etc., R. Co.*, 45 N. Y. 514; *Keeney v. Grand Trunk R. Co.*, 47 N. Y. 525; *Uptegrove v. Central R. Co.*, 37 N. Y. Supp. 659; *Goodrich v. Thompson*, 44 N. Y. 324; *Robinson v. Merchants' Dispatch, etc., Co.*, 45 Iowa 470; *Hand v. Baynes*, 4 Whart. (Pa.) 204; *Pavitt v. Lehigh Valley R. Co.*, 153 Pa. St. 302 (carriage by freight train instead of passenger train as agreed); *Hunnewell v.*

*Taber*, 2 Sprague 1; *Sleat v. Flag*, 5 B. & Ald. 342.

<sup>2</sup> *Canfield v. Baltimore, etc., R. Co.*, 93 N. Y. 532; *Grogan v. Adams Exp. Co.*, 114 Pa. St. 523, s. c. 7 Atl. R. 134; *Merchants' Dispatch, etc., Co. v. Bloch*, 86 Tenn. 392, s. c. 6 S. W. R. 881; *Adams Exp. Co. v. Haynes*, 42 Ill. 89; *Mann v. Birchard*, 40 Vt. 326; *Chapman v. New Orleans etc., R. Co.*, 21 La. Ann. 224, s. c. 99 Am. Dec. 722;

claims that the loss or damage occurred from some cause excepted in the special contract the burden is upon the carrier to show that fact.<sup>1</sup> As we have seen, however, the carrier is generally liable for its own negligence even though the loss was from some excepted cause, such as fire or the like, occasioned by its failure to exercise due care. In many of the states the burden is upon the carrier to show not only that the cause of the loss was within the terms of the exception, but also that there was, on its part, no negligence or want of due care,<sup>2</sup> or, at least, none which was a proximate cause of

*Nelson v. Woodruff*, 1 Black (U. S.) 156; *Rintoul v. New York, etc., R. Co.*, 17 Fed. R. 905; *Transportation Co. v. Downer*, 11 Wall. (U. S.) 129; *Chesapeake, etc., R. Co. v. Radbourne*, 52 Ill. App. 203; *Georgia R., etc., Co. v. Keener*, 93 Ga. 808, s. c. 21 S. E. R. 287; *St. Louis, etc., R. Co. v. Parmer*, (Tex. Civ. App.) 30 S. W. R. 1109; *George v. Chicago, etc., R. Co.*, 57 Mo. App. 358; *Witting v. St. Louis, etc., R. Co.*, 101 Mo. 631; *Inman v. South Carolina R. Co.*, 129 U. S. 128, s. c. 37 Am. & Eng. R. Cas. 663, 669; *Pennsylvania R. Co. v. Liveright*, (Ind. App.) 41 N. E. R. 350, 43 N. E. R. 162; *Little v. Boston, etc., R. Co.*, 66 Me. 239; *Tygert Co. v. The Charles P. Sinnickson*, 24 Fed. R. 304; *Browning v. Goodrich Transp. Co.*, 78 Wis. 391, s. c. 10 L. R. A. 415.

<sup>1</sup>*Gaines v. Union, etc., Co.*, 28 Ohio St. 418; *Merchants' Dispatch, etc., Co. v. Bloch*, 86 Tenn. 392, s. c. 6 Am. St. R. 847; *Verner v. Sweitzer*, 32 Pa. St. 208; *St. Louis, etc., R. Co. v. Lesser*, 46 Ark. 236; *Bennett v. Filyaw*, 1 Fla. 403; *Alden v. Pearson*, 3 Gray (Mass.) 342; *South, etc., R. Co. v. Henlein*, 52 Ala. 606; *Kallman v. United States Exp. Co.*, 3 Kan. 205; *Baltimore, etc., R. Co. v. Brady*, 32 Md. 333; *Western R. Co. v. Harwell*, 91 Ala. 340, s. c. 8 So. R. 649; *Lindsley v. Chicago, etc., R. Co.*, 36 Minn.

539, s. c. 1 Am. St. R. 692; *Cumming v. The Barracouta*, 40 Fed. R. 498; *The Freedom*, L. R. 3 P. C. 594; *Wallingford v. Columbia, etc., R. Co.*, 26 S. Car. 258, s. c. 2 S. E. R. 19; *Witting v. St. Louis, etc., R. Co.*, 28 Mo. App. 103; *Terre Haute, etc., R. Co. v. Sherwood*, 132 Ind. 129, s. c. 31 N. E. R. 781; *Chapman v. New Orleans, etc., R. Co.*, 21 La. Ann. 224, s. c. 99 Am. Dec. 722; *Wheeler's Modern Law of Carriers*, 252; *Lawson's Contr. of Carriers*, §§ 246, 247. Many of the above cases hold that the burden is upon the carrier to plead and prove the special contract limiting its liability. To this effect are also *Schaeffer v. Philadelphia, etc., R. Co.*, 168 Pa. St. 209, s. c. 31 Atl. R. 1088; *Missouri Pac. R. Co. v. Wichita, etc., Co.*, (Kan.) 40 Pac. R. 899; *Atchison, etc., R. Co. v. Bryan* (Tex. Civ. App.) 28 S. W. R. 98; *Western Transp. Co. v. Newhall*, 24 Ill. 466, s. c. 76 Am. Dec. 760; *McMillan v. Michigan, etc., R. Co.*, 16 Mich. 79, s. c. 93 Am. Dec. 208; *Fillebrown v. Grand Trunk R. Co.*, 55 Me. 462, s. c. 92 Am. Dec. 606. But we do not believe that this rule can prevail in all cases in all jurisdictions.

<sup>2</sup>*Shea v. Minneapolis, etc., R. Co.*, (Minn.) 65 N. W. R. 458; *Shriver v. Sioux City, etc., R. Co.*, 24 Minn. 506; *Ryan v. Missouri, etc., R. Co.*, 65 Tex. 13; *Chicago, etc., R. Co.*



the loss. But the weight of authority supports the rule that, after the loss is once shown to be within the exception, the burden is upon the plaintiff to show negligence upon the part of the carrier.<sup>1</sup> Eminent judges and text writers approve the former rule and much may be said in its favor,<sup>2</sup> but we are in-

*v. Moss*, 60 Miss. 1003; *Johnson v. Alabama, etc., R. Co.*, 69 Miss. 191, s. c. 11 So. R. 104; *Berry v. Cooper*, 28 Ga. 543; *Columbus, etc., R. Co. v. Kennedy*, 78 Ga. 646 (under a statute); *Graham v. Davis*, 4 Ohio St. 362; *Gaines v. Union, etc., Co.*, 28 Ohio St. 418; *Wallingford v. Columbia, etc., R. Co.*, 26 S. Car. 258; *Slater v. South Car. R. Co.*, 29 S. Car. 96; *Brown v. Adams Exp. Co.*, 15 W. Va. 812; *Steele v. Townsend*, 37 Ala. 247; *Louisville, etc., R. Co. v. Touart*, 97 Ala. 514, s. c. 11 So. R. 756. See, also, *Boies v. Hartford, etc., R. Co.*, 37 Conn. 272; *Adams Exp. Co. v. Stattaners*, 61 Ill. 184; *Dunseth v. Wade*, 3 Ill. 285; *Chicago, etc., R. Co. v. Manning*, 23 Neb. 552.

<sup>1</sup>*Little Rock, etc., R. Co. v. Talbot*, 39 Ark. 523; *Little Rock, etc., R. Co. v. Harper*, 44 Ark. 208; *Mitchell v. United States Exp. Co.*, 46 Iowa 214; *New Orleans, etc., Co. v. New Orleans, etc., R. Co.*, 20 La. Ann. 302; *Kallman v. United States Exp. Co.*, 3 Kan. 205; *Kansas Pac. R. Co. v. Reynolds*, 8 Kan. 623; *Sager v. Portsmouth, etc., R. Co.*, 31 Me. 228; *Jordan v. American Exp. Co.*, 86 Me. 225, 29 Atl. R. 980; *Read v. St. Louis, etc., R. Co.*, 60 Mo. 199; *Davis v. Wabash, etc., R. Co.*, 89 Mo. 340; *Witting v. St. Louis, etc., R. Co.*, 101 Mo. 631, s. c. 14 S. W. R. 743, 10 L. R. A. 602; *Smith v. American Exp. Co.*, (Mich.) 66 N. W. R. 479; *French v. Buffalo, etc., R. Co.*, 4 Keyes (N. Y.) 108; *Whitworth v. Erie, etc., R. Co.*, 87 N. Y. 413; *Smith v. North Carolina R. Co.*, 64 N. Car. 235; *Farnham v. Camden, etc., R.*

*Co.*, 55 Pa. St. 53; *Hubbard v. Hern-den's Express Co.*, 10 R. I. 244; *Railway Co. v. Manchester Mills*, 88 Tenn. 653; *Clark v. Barnwell*, 12 How. (U. S.) 272; *Transportation Co. v. Downer*, 11 Wall. (U. S.) 129; *Wertheimer v. Pennsylvania R. Co.*, 17 Blatch. (U. S.) 421; *Marsh v. Horne*, 5 Barn. & Cress. 322; *Ohrloff v. Briscall*, L. R. 1 P. C. App. 231. See, also, *Terre Haute, etc., R. Co. v. Sherwood*, 132 Ind. 129; *Indianapolis, etc., R. Co. v. Forsythe*, 4 Ind. App. 326, s. c. 29 N. E. R. 1138. Where there is no evidence as to how the loss occurred the presumption may be against the carrier, but where it is shown to be within the exception and the circumstances do not import negligence on the part of the carrier the burden is upon the plaintiff to prove negligence, which is generally a question of fact for the jury. *Buck v. Pennsylvania R. Co.*, 150 Pa. St. 170, s. c. 24 Atl. R. 678.

<sup>2</sup>See 2 Greenl. Ev., § 219; *Hutchinson on Carriers*, § 766; *Lawson's Contr. of Carriers*, §§ 249, 250. The reasons for this rule are that the facts are best known to the carrier and that it is required by public policy. It may also be urged with plausibility that when the plaintiff makes out a *prima facie* case by showing the delivery and loss it can not be justly said that this is rebutted by showing that it occurred by reason of a cause which was within the exception, where the exception does not cover negligence and such cause does not exclude negligence, but is compatible therewith.

clined to think that the latter is supported by the better reason as well as by the weight of authority.<sup>1</sup> It has also been held by some of the courts that where the property consists of live stock or perishable fruit, or the like, which is peculiarly liable to injury or deterioration because of its inherent nature or vice, it is not enough for the shipper to show that it was delivered by the carrier in a damaged condition;<sup>2</sup> and so it has been held that where the shipper goes with the stock and agrees to take care of it he must show negligence on the part of the carrier and freedom from negligence on his part.<sup>3</sup> It

<sup>1</sup> The burden is upon the plaintiff, where a loss is from an excepted cause, to make out a case entitling him to recover, and this he can not do without showing negligence on the part of the carrier. It is well settled that negligence is a wrong which is never presumed, although it may be proved by circumstances or inferred therefrom. When the loss is shown to be within the exception the case does not rest upon the common law duty or liability of the carrier as an insurer, but upon negligence, and it does not seem just to indulge the same presumption against the carrier in the latter as in the former case. It seems to us that public policy certainly does not require it and that the rule that the burden is upon him who best knows the facts was not meant to be applied to such a case. If that rule were applied indiscriminately it would cast the burden in very many cases upon the defendant to show that he was not guilty of wrong and reverse the usual presumption of innocence and care rather than guilt and negligence. "When he (the carrier) has shown a loss within the exception of his contract, without apparent negligence, he has brought himself within the terms of his bargain. On what principle is that bargain to be nullified by requiring of

him the production of that evidence, the loss or difficulty of obtaining which was the very reason for limiting his responsibility?" *Patterson v. Clyde*, 67 Pa. St. 500.

<sup>2</sup> *Pennsylvania R. Co. v. Raiordon*, 119 Pa. St. 577, s. c. 13 Atl. R. 324; *Hussey v. The Saragossa*, 3 Woods (U. S. C. C.) 380. See, also, *Pittsburgh, etc., R. Co. v. Hollowell*, 65 Ind. 188; *Bartlett v. Pittsburgh, etc., R. Co.*, 94 Ind. 281; *Pittsburgh, etc., R. Co. v. Hazen*, 84 Ill. 36, s. c. 25 Am. R. 422; *Michigan, etc., R. Co. v. McDonough*, 21 Mich. 165; *Clarke v. Rochester, etc., R. Co.*, 14 N. Y. 570, s. c. 67 Am. Dec. 205; *The Hindoustan*, 67 Fed. R. 794.

<sup>3</sup> *Terre Haute, etc., R. Co. v. Sherwood*, 132 Ind. 129; *St. Louis, etc., R. Co. v. Weakly*, 50 Ark. 397, s. c. 7 Am. St. R. 104, 117; *Louisville, etc., Q. Co. v. Hedger*, 9 Bush (Ky.) 645; *McBeath v. Wabash, etc., R. Co.*, 20 Mo. App. 445. See, also, *Harvey v. Rose*, 26 Ark. 3; *Clark v. St. Louis, etc., R. Co.*, 64 Mo. 440, 448. In such a case he is presumed to know the facts as well as the carrier, and the rule that the burden is upon the party who has peculiar knowledge of the facts which is sometimes invoked to cast the burden upon the carrier, is held not to apply, no matter what the rule may be in other cases.

can not be said, however, that either of these propositions is settled law in all jurisdictions.<sup>1</sup> But the rule which affirms that the burden is on the shipper in such cases rests, we think, on solid foundations. It seems to have been sometimes overlooked, but there are few, if any, well considered cases in which it has been expressly denied.

<sup>1</sup> See *Central R., etc., Co. v. Haskell*, 91 Ga. 382, s. c. 17 S. E. R. 838, 8; *Phoenix, etc., Works v. Pittsburg, etc., R. Co.* 139 Pa. St. 284, s. c. 20 Atl. R. Lewis' Am. R. & Corp. R. 395; 1058.

## CHAPTER LXII.

### DELIVERY BY THE CARRIER.

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| <p>§ 1517. Generally.</p> <p>1518. Personal delivery.</p> <p>1519. Place of delivery.</p> <p>1520. Time of delivery.</p> <p>1521. Manner of delivery.</p> <p>1522. Custom and usage.</p> <p>1523. Delivery must be to right person.</p> <p>1524. Delivery to agent.</p> <p>1525. Right of carrier to require identification of consignee.</p> <p>1526. Misdelivery.</p> | <p>§ 1527. Notice by consignee or his agent.</p> <p>1528. Reasonable time to inspect and remove.</p> <p>1529. Rule where goods are to be held until called for.</p> <p>1530. Rule where goods are not to be delivered until paid for.</p> <p>1531. Waiver by consignee.</p> <p>1532. Carrier's right to receipt or surrender of bill of lading.</p> <p>1533. Duty to store—Liability as warehouseman.</p> |
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§ 1517. **Generally.**—A common carrier engages not only to carry safely but also to deliver.<sup>1</sup> Its duty as a common carrier and its liability as an insurer is not terminated, ordinarily, until there is a delivery of the goods,<sup>2</sup> either actual or under such circumstances as to constitute a constructive delivery. Stated in the most general and comprehensive terms, the delivery must be made within and at a reasonable time, to the

<sup>1</sup> *Bodenham v. Bennett*, 4 Price 31; *Duff v. Budd*, 3 Brod. & B. 177; *Parker v. Flagg*, 26 Me. 181; *Lamb v. Camden*, etc., R. Co., 2 Daly (N. Y.) 454; *Shenk v. Philadelphia Steam*, etc., Co., 60 Pa. St. 109; *Wilson v. California*, etc., R. Co., 94 Cal. 166, s. c. 29 Pac. R. 861; *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, s. c. 8 Sup. Ct. R. 266, 269; *South and North Alabama R. Co. v. Wood*, 66 Ala. 167, s. c. 9 Am. & Eng. R. Cas. 419; *Bartlett v. Steamboat Philadelphia*, 32 Mo. 256.

<sup>2</sup> *Smith v. Nashua*, etc., R. Co., 27 N. H. 86; *Southern Ex. Co. v. Newby*, 36 Ga. 635; *Richards v. London*, etc., R. Co., 7 C. B. 839; *Fowles v. Great Western*, etc., R. Co., 7 Exch. 699; *Hall v. Boston*, etc., R. Co., 14 Allen (Mass.) 439; *Hutchinson on Carriers* (2d ed.) § 338, 3 Woods on Railroads, (Minor's ed.) § 441.

right person, at the proper place and in a proper manner.<sup>1</sup> As we shall hereafter show, however, an actual personal delivery is not always required, especially in the case of a railroad company.<sup>2</sup> No general rule, applicable to all cases, can be stated as to what constitutes a good and sufficient delivery. Much necessarily depends upon the circumstances of each particular case, and whether there has or has not been a sufficient delivery in the particular case is usually, but not always, a question of fact, or a mixed question of law and fact, for the jury under proper instructions by the court.<sup>3</sup>

§ 1518. **Personal delivery**—At common law ordinary carriers, such as carriers by wagon, were required to make a personal delivery of the goods to the consignee or other proper person at his house or place of business, but, in the case of railroad companies, which have fixed routes and depots or places for delivery, a well-settled custom has grown up, as in the case of vessels, to deliver at those places, and personal delivery at the residence or place of business of the consignee is not required.<sup>4</sup> But if the goods are directed to a particular

<sup>1</sup> Hutchinson on Carriers, (2d ed.) § 340; *Bartlett v. Steamboat Philadelphia*, 32 Mo. 256; *Hill v. Humphreys*, 5 Watts & S. (Pa.) 123; *Eagle v. White*, 6 Whart. (Pa.) 505, s. c. 37 Am. Dec. 434.

<sup>2</sup> *Post*, § 1518.

<sup>3</sup> *Hedges v. Hudson River R. Co.*, 6 Robt. (N. Y.) 119; *Derosia v. Winona*, etc., R. Co., 18 Minn. 133; *Quiggin v. Duff*, 1 M. & W. 174; *McGraw v. Baltimore*, etc., R. Co., 18 W. Va. 361, s. c. 41 Am. R. 696, s. c. 9 Am. & Eng. R. Cas. 188; *Columbus*, etc., R. Co. v. *Flournoy*, 75 Ga. 745. The first case above cited was reversed on appeal, the court holding that as the facts were undisputed, the question was one of law for the court. *Hedges v. Hudson River R. Co.*, 49 N. Y. 223. See, also, *Whitney Mfg. Co. v. Rich-*

*mond*, etc., R. Co., 38 So. Car. 365, s. c. 17 S. E. R. 147.

<sup>4</sup> *South and North Ala. R. Co. v. Wood*, 66 Ala. 167, s. c. 9 Am. & Eng. R. Cas. 419; *Jeffersonville, R. Co. v. Cleveland*, 2 Bush (Ky.) 468; *Bansemmer v. Toledo*, etc., R. Co., 25 Ind. 434, s. c. 87 Am. Dec. 367; *Witbeck v. Holland*, 45 N. Y. 13; *Thomas v. Boston*, R. Co., 10 Metc. (Mass.) 472; *New Orleans*, etc., R. Co. v. *Tyson*, 46 Miss. 729; *Francis v. Dubuque*, etc., R. Co., 25 Iowa 60. Even where a statute requires the delivery of grain to the warehouse or elevator to which it is consigned, the company is required only to do so when it can by using the tracks which it has a right to use, and can not be compelled to run its cars over tracks which it does not own and has no right to use. *Hoyt v. Chicago*,

place by street and number and "streetage" or "cartage," is charged for transporting and delivering them there, in addition to the regular charges for transportation and delivery at the depot, it is the duty of the carrier to deliver them at the designated place.<sup>1</sup> So, where the consignee had his elevator on the line of the road and was prepared to receive grain shipped to such place directly from the cars into the elevator it was held that the reason for relaxing the common law rule requiring personal delivery did not apply and that it was the duty of the railroad company to make a personal delivery at the elevator to which the grain was consigned.<sup>2</sup> We think there can be no doubt that the company may bind itself to make a personal delivery, in such cases, by express contract, and that even in the absence of such a contract, custom may, in the particular instance, require it to do so.

§ 1519. **Place of delivery.**—The delivery must be made at a suitable place.<sup>3</sup> As a general rule the depot or warehouse of the company at the town or station to which the goods are shipped is the proper place.<sup>4</sup> But if the carrier, having no depot or warehouse in such town, is directed by the proper party to leave them at a particular place therein, compliance therewith will be sufficient.<sup>5</sup> This rule applies where the consignee directs them to be delivered at a different place from that specified in the contract, or accepts them at a different place.<sup>6</sup>

etc., R. Co., 93 Ill. 601. See, also, *Stetler v. Chicago, etc., R. Co.*, 49 Wis. 609, s. c. 6 N. W. R. 303.

<sup>1</sup> *Baltimore, etc., R. Co. v. Green*, 25 Md. 72; *Schroeder v. Hudson River R. Co.*, 5 Duer (N. Y.) 55; *Cahn v. Michigan Cent. R. Co.*, 71 Ill. 96.

<sup>2</sup> *Vincent v. Chicago, etc., R. Co.*, 49 Ill. 33, approved in *State v. Republican Valley R. Co.*, 17 Neb. 647, s. c. 24 N. W. R. 329, 52 Am. R. 424.

<sup>3</sup> *Jewell v. Grand Trunk R. Co.*, 55 N. H. 84; *Rooth v. Northeastern R. Co.*, L. R. 2 Exch. 173.

<sup>4</sup> *Norway Plains Co. v. Boston, etc.,*

*R.*, 1 Gray (Mass.) 263, s. c. 61 Am. Dec. 423; *Ray on Freight Carriers* 888.

<sup>5</sup> *Rowe v. Pickford*, 8 Taunt. 83 s. c. 1 Moore 526; *Dixon v. Baldwin*, 5 East 175; *Scott v. Pettit*, 3 Bos. & P. 469.

<sup>6</sup> *London, etc., Ry. v. Bartlett*, 7 H. & N. 400; *Cork Distilleries Co. v. Great Southern, etc., Co.*, L. R. 7 H. L. 269; *Sweet v. Barney*, 23 N. Y. 335; *Cleveland, etc., R. Co. v. Sargent*, 19 Ohio St. 438; *Lewis v. Western R. Co.*, 11 Met. (Mass.) 509. But not if the carrier knows

There is no obligation, however, as a general rule, to receive goods at a different station or place from that to which they are consigned, and the company can not escape liability by tendering the goods at a different place.<sup>1</sup> But, in the absence of anything to the contrary, custom, known and acquiesced in by the parties, may justify the railroad company in delivering the freight at a public or an independent warehouse or elevator.<sup>2</sup> Where goods were shipped to a place named Flesherton and it appeared that such was the name both of the railroad station and of a village, about five miles away, where the consignee had his place of business, it was held that the destination of the goods was the station and not the village, and that a shed at such station where the company was in the habit of unloading and storing goods was a warehouse within the meaning of a bill of lading providing that the responsibility of the company should cease when the goods were placed in the company's warehouse at their final destination.<sup>3</sup> So, where a company simply agreed to carry goods to a certain place, it was held that its duty was performed when it carried them safely to its depot at that place and then notified and gave the consignee an opportunity to receive, inspect and take them away, and that, in the absence of any controlling custom, it was under no obligation to deliver them to another company for ultimate delivery at a

that the title has not passed to the consignee or that he has no right to change the destination. *Southern Ex. Co. v. Dickson*, 94 U. S. 549.

<sup>1</sup>*Toledo, etc., R. Co. v. Hammond*, 33 Ind. 379, s. c. 5 Am. R. 221; *Railroad Co. v. O'Donnell*, 49 Ohio St. 489; *Mahon v. Blake*, 125 Mass. 477; *Gulf, etc., R. Co. v. Clark*, 2 Tex. App. (Civil Cases) 459, s. c. 18 Am. & Eng. R. Cas. 628. See, also, *Edwards v. Railroad Co.*, 32 S. Car. 117; *Benbow v. North Car. R. Co.*, Phillips Law 421, s. c. 98 Am. Dec. 76; *Houston, etc., R. Co. v. Adams*, 49 Tex. 748, s. c. 30 Am. R. 116; *St. Louis,*

*etc., R. Co. v. Rose*, 20 Ill. App., note 670; *Perkins v. Smith*, 1 Wils. 328; *Meyer v. Chicago, etc., R. Co.*, 24 Wis. 566. Trover will usually lie as for conversion of the goods.

<sup>2</sup>*Arthur v. St. Paul, etc., R. Co.*, 38 Minn. 95, s. c. 35 N. W. R. 718; *Black v. Ashley*, 80 Mich. 90, s. c. 44 N. W. R. 1120. See, also, *Ostrander v. Brown*, 15 Johns. (N. Y.) 39, s. c. 8 Am. Dec. 211; *Farmers', etc., Bank v. Champlain, etc., Co.*, 16 Vt. 52, s. c. 42 Am. Dec. 491, and note.

<sup>3</sup>*Richardson v. Canadian Pac. R. Co.*, 19 Ont. R. 369, s. c. 45 Am. & Eng. R. Cas. 413.

more convenient place.<sup>1</sup> In another recent case the same court held that when goods are shipped to a place where the company has no depot and no agent it is a good delivery to leave the car on a side-track, and if there is no side-track, it may unload them, at least where they are not perishable—the freight in this case being a carload of bricks—and leave them on the ground even though the consignee is not present, and that it has no right to carry them to the next station upon finding no one present at the former place to receive them.<sup>2</sup> It seems, however, that a vendor who contracts to deliver goods “f. o. b.” at a place to which they are shipped, and has fully performed his contract, is not entitled to recover for the loss of the goods by fire after their arrival and before they are unloaded, although, as between the owner to whom they were consigned and the carrier, the goods might not have been completely delivered.<sup>3</sup>

§ 1520. **Time of delivery.**—The delivery must be made at a proper time<sup>4</sup> as well as at a proper place. So, it is the duty of the carrier to deliver within a reasonable time.<sup>5</sup> What is a

<sup>1</sup> *Melbourne v. Louisville, etc., R. Co.*, 88 Ala. 443, s. c. 6 So. R. 762.

<sup>2</sup> *Louisville, etc., R. Co. v. Gilmer*, 89 Ala. 534, s. c. 7 So. R. 654, 42 Am. & Eng. R. Cas. 450. See, also, *South, etc., R. Co. v. Wood*, 66 Ala. 167.

<sup>3</sup> *Capehart v. Furman Imp. Co.*, 103 Ala. 671, 16 So. R. 625.

<sup>4</sup> *Eagle v. White*, 6 Whart. (Pa.) 505; *The Grafton*, 1 Blatchf. (U. S. C.) 173; *Ely v. New Haven, etc., Co.*, 53 Barb. (N. Y.) 207. It would seem that Sunday, a legal holiday, or after business hours is not a reasonable time and that the consignee is not bound to take the goods away on such a day. See *Russell Mfg. Co. v. New Haven Steamboat Co.*, 50 N. Y. 121; *Missouri Pac. R. Co. v. Wichita, etc., Co.*, 55 Kan. 525, 40 Pac. 899. But it has been held that a carrier is not liable for unloading on a holiday. *Richardson v. Goddard*, 23 How. (U. S.) 28;

*Sleade v. Payne*, 14 La. Ann. 453; *Shelton v. Merchants', etc., Co.*, 59 N. Y. 258.

<sup>5</sup> *McGraw v. Baltimore, etc., R. Co.*, 18 W. Va. 361, s. c. 41 Am. R. 696; *Philadelphia, etc., R. Co. v. Lehman*, 56 Md. 209, s. c. 40 Am. R. 415, s. c. 6 Am. & Eng. R. Cas. 194; *Gates v. Chicago, etc., R. Co.*, 42 Neb. 379, s. c. 60 N. W. R. 583; *Hughes v. Great Western, etc., R. Co.*, 14 C. B. 637; *Coffin v. New York, etc., R. Co.*, 64 Barb. (N. Y.) 379; *Cope v. Cordova*, 1 Rawle (Pa.) 203; *St. Louis, etc., R. Co. v. Heath*, 41 Ark. 476; *Hewett v. Chicago, etc., R. Co.*, 63 Iowa 611; *Ostrander v. Brown*, 15 Johns. (N. Y.) 39, s. c. 8 Am. Dec. 211, and note; *Davis v. Jacksonville, etc., R. Co.*, 126 Mo. 69, 28 S. W. R. 965; *Kennedy v. American Ex. Co.*, 22 Ont. App. 278; *Chickering v. Fowler*, 4 Pick. (Mass.) 371; *Pickett v. Downer*, 4 Vt. 21. But



reasonable time necessarily depends, to some extent, upon the peculiar circumstances of each particular case, and is usually a question of fact, or a mixed question of law and fact, for the jury, under proper instructions.<sup>1</sup> Where the consignee sent for the goods on Saturday afternoon, but was told that they would be late in arriving, and that he need not call for them again until Monday, and the goods arrived about sundown Saturday evening and were burned in the company's warehouse before Monday morning, it was held that the carrier was liable, although the consignee had been informed in the meantime of their arrival.<sup>2</sup> But where heavy freight was shipped on a steamboat, and it was customary for the consignee to be present to receive the goods at the dock, it was held that the carrier was not liable as for conversion, although, in the absence of any one to guard the goods, or any convenient place to store them, they were kept on board the boat until its return the next day.<sup>3</sup>

§ 1521. **Manner of delivery.**—We have already considered the mode or manner of delivery in treating of personal delivery and the time and place of delivery and little remains to be said upon the subject. The carrier must afford the consignee an opportunity to remove the goods and should provide reason-

see *Geismer v. Lake Shore, etc., R. Co.*, 102 N. Y. 563, s. c. 7 N. E. R. 828, holding that this is not an absolute duty. Circumstances may excuse the failure to deliver in what would ordinarily be a reasonable time. *Davis v. Garret*, 6 Bing. 716; *Taylor v. Great Northern R. Co.*, L. R. 1 C. P. 385; *Briddon v. Great Northern R. Co.*, 28 L. J. Exch. 51; *Illinois Cent. R. Co. v. Haynes*, 64 Miss. 604; *Lipford v. Charlotte R. Co.*, 7 Rich. (S. Car.) 409. But if it has expressly contracted to deliver in a certain time it must do so. *Donohoe v. London, etc., R. Co.*, 15 Week. R. 792; *Pickford v. Grand Junction R. Co.*, 12 Mees. & W. 766.

<sup>1</sup> *Columbus, etc., R. Co. v. Flournoy*, 75 Ga. 745; *McGraw v. Baltimore, etc., R. Co.*, 18 W. Va. 361, s. c. 41 Am. R. 696; *Derosia v. Winona, etc., R. Co.*, 18 Minn. 133; *Illinois Cent. R. Co. v. Haynes*, 64 Miss. 604; *Wren v. Eastern, etc., R. Co.*, 1 L. T. N. S. 5; *Hales v. London, etc., R. Co.*, 4 B. & S. 66.

<sup>2</sup> *Wood v. Crocker*, 18 Wis. 345, s. c. 86 Am. Dec. 773. See, also, *Parker v. Milwaukee, etc., R. Co.*, 30 Wis. 689. But compare *Francis v. Dubuque, etc., R. Co.*, 25 Iowa 60, s. c. 95 Am. Dec. 769.

<sup>3</sup> *The Hattie Palmer*, 63 Fed. R. 1015.

able facilities for unloading and enabling him to remove them.<sup>1</sup> Delivery in a particular manner may doubtless be provided for by contract, but in the absence of any specific provision upon the subject it is determined very largely by custom. In delivering grain, coal or similar articles in an elevator or warehouse the carrier should not mix it with other articles of the same kind so that it can not be separated, for in the absence of any provision or controlling custom to the contrary, the consignee is not bound to accept anything in place of the specific article shipped, and the carrier is liable if it wrongfully mixes it with articles of an inferior kind or grade so that it can not deliver the specific article.<sup>2</sup> But a custom has grown up to store grain in elevators with other grain of the same kind and quality and it is generally held in such a case that it is sufficient if the owner receives an equivalent quantity of grain of the same quality, although not the identical grain that he originally owned.<sup>3</sup> Where goods are shipped to a place where there is a side-track, but no depot, platform or agent of the carrier, and this is known to the parties, and is not unreasonable in view of the small amount of business, it has been held that leaving the car of goods upon the side-track is a good delivery and relieves the company from further responsibility.<sup>4</sup> It was also held, upon a second appeal of the case just referred to, that, while the burden is usually upon the carrier to exculpate itself where goods are delivered in a damaged condition, yet, as the plaintiff claimed that there was a failure to deliver

<sup>1</sup> See *Covington Stock Yards Co. v. Keith*, 139 U. S. 128, s. c. 11 Sup. Ct. R. 461; *Oregon, etc., R. Co. v. Ilwaco, etc., Co.*, 51 Fed. R. 611; *Owen v. Louisville, etc., R. Co.*, 87 Ky. 626, s. c. 9 S. W. R. 698; *Myrick v. Michigan Cent. R. Co.*, 9 Biss. (U. S. C. C.) 44; *Independence Mills Co. v. Burlington, etc., R. Co.*, 72 Iowa 535; *Moses v. Boston, etc., R. Co.*, 32 N. H. 523, s. c. 64 Am. Dec. 381; *Hungerford v. Winnebago, etc., Co.*, 33 Wis. 303.

<sup>2</sup> *Rice v. Boston, etc., R. Co.*, 98 Mass. 212; *Leader v. Northern R. Co.*,

3 Ont. R. 92, s. c. 16 Am. & Eng. R. Cas. 287. See, also, *Eaton v. Neumark*, 37 Fed. R. 375; *The Idaho*, 93 U. S. 575.

<sup>3</sup> *Forbes v. Fitchburg R. Co.*, 133 Mass. 154, s. c. 9 Am. & Eng. R. Cas. 80; *Arthur v. Chicago, etc., R. Co.*, 61 Iowa 648, s. c. 16 Am. & Eng. R. Cas. 283. See, also, *Rice v. Nixon*, 97 Ind. 97, s. c. 49 Am. R. 430.

<sup>4</sup> *South & North Alabama R. Co. v. Wood*, 66 Ala. 167, s. c. 41 Am. R. 749, citing *Wells v. Wilmington, etc., R. Co.*, 6 Jones L. (N. Car.) 47.

part of the goods and not that they were injured, and as the car had remained for several days on the side-track with no one in charge of it the burden was upon him to show that the loss occurred between the time when they were received by the company and the time when the car was left upon the side-track.<sup>1</sup> So the rule has been laid down in other cases that "where the carrier is not required in the usual course of business or expected to remove the freight from the car, as in the case of grain in bulk, coal, lumber and the like," its liability as a common carrier is terminated "by delivering the car in a safe and convenient position for unloading at the elevator, warehouse or other place designated by the contract or required in the usual course of business, or, if no place of delivery is thus designated or required, on its side-track in the usual and customary place for unloading by consignees."<sup>2</sup> We do not mean to approve this rule to the full extent of admitting that, under ordinary circumstances, the carrier's liability is at once terminated without notice or the lapse of a reasonable time for the consignee to unload or remove the freight, but we refer to it and the authorities in which it is announced in support of the doctrine that, under some circumstances, delivery may be made in the cars of the company on a side track or other proper and customary place. A railroad company is not bound

<sup>1</sup> *South & North Alabama R. Co. v. Wood*, 71 Ala. 215, s. c. 46 Am. R. 309, 16 Am. & Eng. R. Cas. 267.

<sup>2</sup> *Gregg v. Illinois Cent. R. Co.*, 147 Ill. 550, s. c. 61 Am. & Eng. R. Cas. 208, 35 N. E. R. 343, and other Illinois cases there cited. See, also, *Pittsburgh, etc., R. Co. v. Nash*, 43 Ind. 423; *Southwestern R. Co. v. Felder*, 46 Ga. 433; *Whitney Mfg. Co. v. Richmond, etc., R. Co.*, 38 S. Car. 365, s. c. 17 S. E. R. 147; *Armistead Lumber Co. v. Louisville, etc., R. Co.*, (Miss.) 11 So. R. 472. "It is usual for the consignees themselves to unload and carry away these kinds of freight: (coal, lumber and the like)

directly from the cars. It is also true \* \* \* that there is nothing to prevent a carrier, at least under special circumstances, from using the car as a warehouse for the storage of freight. But in the case of portable boxes or valuable merchandise we think that under ordinary circumstances, \* \* \* in order to terminate the carrier's liability he must remove the goods from the car in which they were transported and place them for safe-keeping in his freight house." *Kirk v. Chicago, etc., R. Co.*, 59 Minn. 161, s. c. 60 N. W. R. 1084, 61 Am. & Eng. R. Cas. 203.

to deliver goods piecemeal and at different times, and the owner or consignee has no right to require it to do so to suit his convenience.<sup>1</sup>

§ 1522. **Custom and usage.**—As we have said, custom frequently exerts an important influence in determining the time, place and manner of delivery.<sup>2</sup> A general custom of the business or a well established usage at the place of delivery usually becomes a part of the contract and governs as to the place, time and mode of making the delivery.<sup>3</sup> Thus, carriers have been held liable for loss occasioned by departing from an established custom,<sup>4</sup> and so, on the other hand they have been relieved from further liability by complying with such a custom. It has been held, however, that if the carrier relies on a custom or upon the instructions of the consignee as to the manner of delivering the goods, it must show that it has fully complied with such custom or instructions.<sup>5</sup> An example of the influence of custom is found in a recent case. It was shown that the carrier had been accustomed to deliver goods to an independent warehouseman whose custom it was to notify the consignee and that the consignee was aware of this custom and had long acquiesced in it. The court held that the liability of the carrier ended with the delivery of the goods to the warehouseman, and that it was not liable for the loss of the goods

<sup>1</sup> *Morris, etc., R. Co. v. Ayres*, 24 N. J. L. 393, s. c. 80 Am. Dec. 215.

<sup>2</sup> *Shelton v. Merchants' Disp. Transp. Co.*, 59 N. Y. 258; *Sleade v. Payne*, 14 La. Ann. 453; *Weed v. Barney*, 45 N. Y. 344, s. c. 6 Am. R. 96; *Lawson on Usages and Customs*, § 96; *Brown on Parol Ev.*, § 58.

<sup>3</sup> *Richardson v. Goddard*, 23 How. (U. S.) 28; *Higgins v. United States, etc., Co.*, 3 Blatchf. (U. S. C. C.) 282; *Blossom v. Smith*, 3 Blatchf. (U. S. C. C.) 316; *The Glover*, 1 Brown Adm. 166; *Arthur v. St. Paul, etc., R. Co.*, 38 Minn. 95, s. c. 35 N. W. R. 718; *Farmers', etc., Bank v. Champlain Transp. Co.*, 16 Vt. 52, s. c. 42 Am.

Dec. 491 and note; *Farmers', etc., Bank v. Champlain Transp. Co.*, 23 Vt. 186; *Loveland v. Burke*, 120 Mass. 139, s. c. 21 Am. R. 507; *Gibson v. Culver*, 17 Wend. (N. Y.) 305; *New York Cent., etc., R. Co. v. Standard Oil Co.*, 87 N. Y. 486.

<sup>4</sup> *Southern Exp. Co. v. Everett*, 37 Ga. 688. See, also, *Richmond v. Union Steamboat Co.*, 87 N. Y. 240.

<sup>5</sup> *Baldwin v. American Exp. Co.*, 23 Ill. 197; *Haslam v. Adams' Exp. Co.*, 6 Bosw. (N. Y.) 235. And custom or usage will not relieve it from liability for negligence. *Hibler v. McCartney*, 31 Ala. 501.

by fire while in the warehouse.<sup>1</sup> So, it has been held that where there are two places in the same town for the delivery of freight, one being the depot proper and the other a platform, where heavy and bulky articles were usually deposited, the usage of the place as to which would be the proper point for delivering cotton bales, may be shown, where neither is specifically designated.<sup>2</sup> As a general rule, however, unless the course of dealing between the parties has been such as to render proof of a general custom unnecessary,<sup>3</sup> the usage must be lawful, general, uniform and certain, and no usage can override a valid express and specific contract.<sup>4</sup>

§ 1523. **Delivery must be to right person.**—The rule in regard to the person to whom delivery must be made is very strict. It must be made to the right person,<sup>5</sup> and it seems that neither the fraud or imposition of any one else nor mistake on the part of the carrier will excuse it from liability if it deliver the goods to the wrong person.<sup>6</sup> The right person is, ordinarily, the consignee or his authorized agent.<sup>7</sup> But if

<sup>1</sup> *Black v. Ashley*, 80 Mich. 90, s. c. 44 N. W. R. 1120.

<sup>2</sup> *Homesly v. Elias*, 66 N. Car. 330. See, also, *McMasters v. Pennsylvania R. Co.*, 69 Pa. St. 374.

<sup>3</sup> See *Barnes v. Foley*, 5 Burr. 2711; *Loveland v. Burke*, 120 Mass. 139, s. c. 21 Am. R. 507.

<sup>4</sup> *Benson v. Gray*, 154 Mass. 391, s. c. 28 N. E. R. 275. See, also, *Dickinson v. Gay*, 7 Allen (Mass.) 29; *Emery v. Boston, etc., Insurance Co.*, 138 Mass. 398; *Collender v. Dinsmore*, 55 N. Y. 200; *Simmons v. Law*, 3 Keyes (N. Y.) 217; *Powell v. Thompson*, 80 Ala. 51; *Broom's Leg. Max.* (5th Am. ed.) 828; *Browne on Parol Ev.*, §§ 58, 59, 2 Greenl. Ev., § 246; *Carver's Carriage of Goods by Sea*, 185.

<sup>5</sup> *Ante*, § 1426, and following notes to this section. See, also, note to *Sword v. Young*. 3 Lewis' Am. R. & Corp. R. 451.

<sup>6</sup> *Viner v. New York, etc., Co.*, 50

N. Y. 23; *McEntee v. New Jersey, etc., Co.*, 45 N. Y. 34; *Guillaume v. General Transp. Co.*, 100 N. Y. 491; *Winslow v. Vermont, etc., R. Co.*, 42 Vt. 700; *American, etc., Exp. Co. v. Milk*, 73 Ill. 224; *American Exp. Co. v. Stack*, 29 Ind. 27; *Little Rock, etc., R. Co. v. Glidewell*, 39 Ark. 487, s. c. 18 Am. & Eng. R. Cas. 539; *Houston, etc., R. Co. v. Adams*, 49 Tex. 748; *Meyer v. Chicago, etc., R. Co.*, 24 Wis. 566, s. c. 1 Am. R. 207; *Wernwag v. Philadelphia R. Co.*, 117 Pa. St. 46; *Shenk v. Philadelphia Propeller Co.*, 60 Pa. St. 109, s. c. 100 Am. Dec. 541; *Southern Exp. Co. v. Crook*, 44 Ala. 468, s. c. 4 Am. R. 140; *Duff v. Budd*, 3 Brod. & B. 177; *Stephenson v. Hart*, 4 Bing. 476. See, also, *post*, § 1526.

<sup>7</sup> *Ante*, § 1426, and authorities there cited. See, also, *Dyer v. Great Northern R. Co.*, 51 Minn. 345; *Hoare v. Great Western R.*, 37 L. T. R. (N. S.)

the carrier delivers to any one, even to the consignee, without the production of the bill of lading, it runs the risk of having to show a delivery in accordance with the terms thereof,<sup>1</sup> and where a vendor ships goods and takes a bill of lading in his own name or to his order, the carrier can not safely deliver the goods to any one else unless the bill is indorsed or transferred by him and produced by the person to whom they are delivered.<sup>2</sup> Indeed, it has been held that where the bill of lading requires the goods to be delivered to the consignor, the mere production of the bill by another, unindorsed by the consignor, will not justify the carrier in delivering them to such other person, unless the consignor intended to pass the title to the goods by the transfer of the bill of lading without indorsement, and that a mere local custom to deliver goods to any person who produces the bill of lading unindorsed does not bind the shipper, at least where he has no knowledge of such custom.<sup>3</sup> But in another recent case it was held that a railroad company could safely deliver goods to the consignee in good faith, without the production of the bill of lading, where

186, 25 W. R. 63; *Southern Exp. Co. v. Everett*, 37 Ga. 688; *Adams v. Blankenstein*, 2 Cal. 413.

<sup>1</sup> *Furman v. Union Pac. R. Co.*, 106 N. Y. 579, s. c. 13 N. E. R. 587; *City Bank v. Rome, etc.*, R. Co., 44 N. Y. 136; *McEwen v. Jeffersonville, etc.*, R. Co., 33 Ind. 368, s. c. 5 Am. R. 216; *Houston, etc.*, R. Co. v. *Adams*, 49 Tex. 748, s. c. 30 Am. R. 116; *Pennsylvania R. Co. v. Stern*, 119 Pa. St. 24; *First Nat. Bank v. Northern R. Co.*, 58 N. H. 203; *Nat. Bank of Chester v. Atlanta, etc.*, R. Co., 25 S. Car. 216; *Jeffersonville, etc.*, R. Co. v. *Irvin*, 46 Ind. 180.

<sup>2</sup> *Young v. East Alabama R. Co.*, 80 Ala. 100; *Douglas v. People's Bank*, 86 Ky. 176, s. c. 5 S. W. R. 420. See *ante*, §§ 1426, 1427.

<sup>3</sup> *Weyand v. Atchison, etc.*, R. Co., 75 Iowa 573, s. c. 39 N. W. R. 899, 1

L. R. A. 650, citing *Shaw v. Railroad Co.*, 101 U. S. 557; *Hutch. Carr.*, §§ 129, 130, 344, 348; *Congar v. Galena, etc.*, R. Co., 17 Wis. 477; *Krulder v. Ellison*, 47 N. Y. 36; *Lawrence v. Minturn*, 17 How. (U. S.) 100; *Alderman v. Eastern R. Co.*, 115 Mass. 233; *Couch v. Watson Coal Co.*, 46 Iowa 17; *Berkshire Woollen Co. v. Proctor*, 7 Cush. (Mass.) 417; *Wilson v. Bauman*, 80 Ill. 493; 2 Greenl. Ev., § 251; and distinguishing *Merchants' Bank v. Union R., etc.*, Co., 69 N. Y. 374; *Lickbarrow v. Mason*, 2 T. R. 63, 1 Smith Lead. Cas. \*848 (8th ed. 1159); *Dows v. Greene*, 24 N. Y. 638; *Allen v. Williams*, 12 Pick. (Mass.) 297; *Fearon v. Bowers*, 1 H. Bl. 364 note, 1 Smith Lead. Cas. (5th ed. 705.) See *ante*, §§ 1428, 1429, 1430. See, also, *North Pennsylvania R. Co. v. Commercial Bank*, 123 U. S. 727.

they were billed "straight" to the consignee and not to either his or the consignor's "order," by showing a custom to so deliver goods, without the production of the bill of lading, in reliance upon the way-bill, and that such delivery would be good as against parties who had made advances to the consignee and taken the bill of lading as security.<sup>1</sup>

§1524. **Delivery to agent.**—So strict is the rule in regard to delivery to the right person that the carrier who delivers the goods to any one for the consignee without the bill of lading or an order from the latter does so at its peril. Thus, a delivery to a drayman or cartman who has no authority from the consignee to receive the goods for him is made at the risk of the carrier.<sup>2</sup> So, it has been held that where goods are directed to the consignee the carrier is not discharged from liability by delivering them to the general agent of the consignee at the place of destination,<sup>3</sup> even though the consignee can not be found at that place.<sup>4</sup> But, on the other hand, it was held in a recent case, that notice to a drayman who was accustomed to receive the consignee's goods was sufficient notice of their arrival where the consignee was out of town and could not be notified in person.<sup>5</sup> So, it is said that no greater proof of the authority of the person to whom they are delivered is required than in any other case,<sup>6</sup> and a delivery to one who has been accustomed to receive goods for the shipper and consignee has been held sufficient.<sup>7</sup>

<sup>1</sup> *Forbes v. Boston, etc., R. Co.*, 133 Mass. 154, s. c. 9 Am. & Eng. R. Cas. 76, 80. But see *ante*, §§ 1426, 1429.

<sup>2</sup> *Alabama, etc., R. Co. v. Kidd*, 35 Ala. 209; *Bartlett v. Steamboat Philadelphia*, 32 Mo. 256; *Hermann v. Goodrich*, 21 Wis. 536; *Williams v. Holland*, 22 How. Pr. (N. Y.) 137; *Dean v. Vaccaro*, 2 Head (Tenn.) 488. See, also, *Angle v. Mississippi, etc., R. Co.*, 18 Iowa 555; *Nebenzahl v. Fargo*, 15 Daly (N. Y.) 130; *Waldron v. Chicago, etc., R. Co.*, 1 Dak. 351, s. c. 46 N. W. R. 456; *Adams v. Blankenstein*, 2 Cal. 413.

<sup>3</sup> *Ela v. American Merchants' Un. Exp. Co.*, 29 Wis. 611, s. c. 9 Am. R. 619.

<sup>4</sup> *Wilson Sewing Mach. Co. v. Louisville, etc., R. Co.*, 71 Mo. 203.

<sup>5</sup> *Burdett v. Canadian Pac. R. Co.*, 10 Manitoba R. 5.

<sup>6</sup> *Wilcox v. Chicago, etc., R. Co.*, 24 Minn. 269.

<sup>7</sup> *Ontario Bank v. New Jersey Steamboat Co.*, 59 N. Y. 510. In this case the bill of lading stated that the property was addressed to order of the shipper at New York and deliverable at Coentie's Slip, with instructions to

§ 1525. **Right of carrier to require identification of consignee.**—As the carrier is held so strictly to the performance of its duty to deliver to the right person, it is no more than just that it should be allowed to require reasonable identification of the consignee where that appears to be necessary in order to protect itself. Indeed, it is its duty as well as its right, in case of doubt, to require proper identification.<sup>1</sup> A reasonable delay in the delivery of the goods in such a case for that purpose is, therefore, unobjectionable and the consignee can not complain, especially when he has no bill of lading or there are other suspicious circumstances. It is generally for the jury to determine whether the delay and the requirements of the carrier as to identification are reasonable or not.<sup>2</sup> The carrier can not, of course, lawfully insist upon unreasonable requirements or take advantage of this rule to cover up its own defaults.

§ 1526. **Misdelivery.**—The effect of a misdelivery of goods is in general the same as a total failure to deliver them at all and is deemed a conversion of the property by the carrier.<sup>3</sup> No

“advise” the person to whom they were there delivered. It also appeared that such person, who was a commission merchant, had received goods shipped in the same way as agent or correspondent of the shipper in many previous instances without objection on the part of the shipper. So, it has been held that the agent of the company is also made the agent of the consignee and if the goods are consigned in care of such agent a delivery to him will be sufficient, although it would be otherwise if the goods were consigned directly to such agent and the carrier knew he was not the real owner and had no authority to receive them for the real owner or consignee. *Bennett v. Northern Pac. Express Co.*, 12 Ore. 49.

<sup>1</sup> *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 34; *Southern Exp. Co.*

*v. Van Meter*, 17 Fla. 783, s. c. 35 Am. R. 107; *American Exp. Co. v. Fletcher*, 25 Ind. 492; *Gulf, etc., R. Co. v. Freeman*, 4 Tex. App. (Civil Cas.) 419, s. c. 16 S. W. R. 109 (carrier not liable for refusal to deliver to unidentified consignee who produces no bill of lading, even though he offers to give security.)

<sup>2</sup> *Baltimore, etc., R. Co. v. Humphrey*, 59 Md. 390, s. c. 9 Am. & Eng. R. Cas. 331; *Watt v. Porter*, 2 Mason, (U. S. C. C.) 77; *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 34; *Ball v. Liney*, 48 N. Y. 6; *Alexander v. Southey*, 5 B. & Ald. 247. See, also, *Sargent v. Gile*, 8 N. H. 325; *Dent v. Chiles*, 5 Stew. & P. (Ala.) 383.

<sup>3</sup> *Forbes v. Fitchburg, etc., R. Co.*, 133 Mass. 154, s. c. 9 Am. & Eng. R. Cas. 80, and note; *Bowlin v. Nye*, 10 Cush. (Mass.) 416; *Claffin v. Boston, etc.,*



demand is necessary in such a case,<sup>1</sup> but if there is simply a refusal to deliver because of non-payment of freight, or the like, and no misdelivery, a demand must usually be made before trover will lie.<sup>2</sup> Leaving goods at the wrong place may constitute a misdelivery and conversion of them as well as delivering them to the wrong person.<sup>3</sup> After the carrier becomes a warehouseman it is liable for a misdelivery only where it is negligent, but so long as it remains liable as a common carrier the general rule, as admitted by all the authorities, is that it must deliver to the right person and that the exercise of even a high degree of care on its part will not excuse a misdelivery. There are, however, cases in which it is difficult to determine whether there has been a misdelivery and cases in which the carrier has been misled by the shipper or consignee or the latter have, by their own acts, enabled a swindler to perpetrate a fraud upon the carrier and thus obtain the goods. When we come to cases of this kind we find conflict among the authorities. Without attempting to review all, or any great number, of them we shall briefly state the facts and rulings in enough of the cases to show what has been held to be a mis-

R. Co., 7 Allen (Mass.) 341; Hall v. Boston, etc., R. Co., 14 Allen (Mass.) 439; Newhall v. Central Pac. R. Co., 51 Cal. 345; Winslow v. Vermont, etc., R. Co., 42 Vt. 700; Devereux v. Barclay, 2 B. & A. 702; St. Louis, etc., R. Co. v. Larned, 103 Ill. 293; Gibbons v. Farwell, 63 Mich. 344, s. c. 29 N. W. R. 855; Hior v. London, etc., R. Co., L. R. 4 Ex. Div. 188, s. c. 40 L. T. R. (N. S.) 674; Cheshire R. Co. v. Foster, 51 N. H. 490; St. Louis, etc., R. Co. v. Rose, 20 Ill. App. 670, note; Louisville, etc., R. Co. v. Barkhouse, 100 Ala. 543, s. c. 13 So. R. 534; First Nat. Bank v. Northern R. Co., 58 N. H. 203; Price v. Oswego, etc., R. Co., 50 N. Y. 213, s. c. 10 Am. R. 475; Merchants' Dispatch Co. v. Merriam, 111 Ind. 5.

<sup>1</sup> Wiggin v. Boston, etc., R. Co., 120

Mass. 201; Missouri Pac. R. Co. v. Heidenheimer, 82 Tex. 195, s. c. 17 S. W. R. 608, 27 Am. St. R. 861; Railroad v. O'Donnell, 49 Ohio St. 489, s. c. 21 L. R. A. 117; Fulton v. Lydecker, 17 N. Y. Supp. 451; Schroeder v. Hudson River R. Co., 5 Duer (N. Y.) 55; Louisville, etc., R. Co. v. Meyer, 78 Ala. 597, s. c. 27 Am. & Eng. R. Cas. 44.

<sup>2</sup> See Michigan, etc., R. Co. v. Bivens, 13 Ind. 263; Northern Transp. Co. v. Sellick, 52 Ill. 249; Bird v. Georgia R. Co., 72 Ga. 655, s. c. 27 Am. & Eng. R. Cas. 39; Rome R. Co. v. Sullivan, 14 Ga. 277.

<sup>3</sup> Railroad Co. v. O'Donnell, 49 Ohio St. 489, s. c. 21 L. R. A. 117, 32 N. E. R. 476; Perkins v. Smith, 1 Wils. 328; Houston, etc., R. Co. v. Adams, 49 Tex. 748, s. c. 30 Am. R. 116.

delivery and how the rule has been applied to peculiar circumstances by different courts. Delivery to the wrong person upon a forged order or the like has been held a misdelivery for which the carrier is liable.<sup>1</sup> So has a delivery to an impostor of goods ordered by him in a fictitious name.<sup>2</sup> Where goods were consigned to "E. Kline," at Louisville, but the wrong street was named in stating his address it was held that delivery to "I. Kling" at such address was a misdelivery for which the carrier was liable.<sup>3</sup> So, where the carrier was informed and knew that the goods were the property of the shipper it was held that it was liable for delivering them to a third person at the place of shipment upon the order of the consignee.<sup>4</sup> On the other hand, it has been held that where goods are ordered in a fictitious name with intent to defraud the shipper and the carrier is directed to send them to a certain address and there deliver them to such person it is not liable for so doing although the shipper was imposed on by such person.<sup>5</sup> So, where there are two persons of the same name in the same city, and one of them, being a swindler, induces the shipper to sell goods to him in the belief that he is the other, who is a reputable merchant, it is held that the carrier is not liable for delivering the goods to the swindler to

<sup>1</sup> *Gosling v. Higgins*, 1 Camp. 451; *Lubbock v. Inglis*, 1 Stark. 83; *American, etc., Exp. Co. v. Milk*, 73 Ill. 224; *Powell v. Myers*, 26 Wend. (N. Y.) 591; *Wernwag v. Philadelphia, etc., R. Co.*, 117 Pa. St. 46; *Houston, etc., R. Co. v. Adams*, 49 Tex. 748, s. c. 30 Am. R. 116; *Southern Exp. Co. v. Van Meter*, 17 Fla. 783, s. c. 35 Am. R. 107; note to *Sword v. Young*, 3 Lewis' Am. R. & Corp. R. 451. But see *Western Union Tel. Co. v. Meyer*, 61 Ala. 158, s. c. 32 Am. R. 1.

<sup>2</sup> *Winslow v. Vermont, etc., R. Co.*, 42 Vt. 700, s. c. 1 Am. R. 365; *Price v. Oswego, etc., R. Co.*, 50 N. Y. 213, s. c. 10 Am. R. 475 (an extreme case); *American Exp. Co. v. Fletcher*, 25 Ind. 492; *Sword v. Young*, 89 Tenn.

126, s. c. 14 S. W. R. 481, 604; *Pacific Exp. Co. v. Shearer*, (Ill.) 43 N. E. R. 816; *ante*, § 1523. In most of such cases, however, the carrier was negligent in not requiring any identification, in delivering the goods when it ought to have known that there was no such person or firm at the place of delivery, or the like.

<sup>3</sup> *McCulloch v. McDonald*, 91 Ind. 240.

<sup>4</sup> *Southern Exp. Co. v. Dickson*, 94 U. S. 549. See, also, *Wright v. Northern Cent. R. Co.*, 8 Phila. (Pa.) 19; *Jeffersonville R. Co. v. White*, 6 Bush (Ky.) 251.

<sup>5</sup> *McKean v. McIvor*, L. R. 6 Exch. 36.

whom they are directed.<sup>1</sup> A similar decision was rendered where the swindler assumed the name of a reputable merchant and the goods were sold and shipped to him in that name at the address which he gave, the carrier being free from negligence and the swindler receipting for the goods in his assumed name.<sup>2</sup> So, where goods were sold to a swindler under a different name and shipped to him in his assumed name, it was held that, as there was no one else in the place who bore the name which he had assumed and as he was the person to whom they had been sold and were shipped, the company was not liable for delivering the goods to him although he was known to the delivery clerk under a different name and pretended that he was acting as agent for such fictitious person.<sup>3</sup> It is difficult to tell just what limitations or exceptions, if any, there are to the general rule requiring the carrier at all events to deliver to the right person, but we think that if the misdelivery is caused by misdirection or other negligence on the part of the shipper, or if fraud is perpetrated upon him by a third person in such a manner that he really parts with the title to the goods to such third person the carrier, acting on the faith of appearances which the owner himself has created and in accordance with his directions, ought not to be held liable to him for delivering the goods to such third person, although the owner was imposed on by him.<sup>4</sup>

§1527. Notice to consignee or his agent.—Attention has already been directed to the diversity of opinion upon the question as to the time when the liability of the railroad company, as a common carrier, ceases and that of a warehouseman at-

<sup>1</sup> *Wilson v. Adams Exp. Co.*, 27 Mo. App. 360; *The Drew*, 15 Fed. R. 826; *Edmunds v. Merchants' Disp. Transp. Co.*, 135 Mass. 283, s. c. 16 Am. & Eng. R. Cas. 250.

<sup>2</sup> *Samuel v. Cheney*, 135 Mass. 278, s. c. 46 Am. R. 467. See, also, *Heugh v. London, etc., R. Co.*, L. R. 5 Exch. 50.

<sup>3</sup> *Dunbar v. Boston, etc., R. Co.*, 110 Mass. 26, s. c. 14 Am. R. 576.

<sup>4</sup> See *Southern Exp. Co. v. Kaufman*, 12 Heisk. (Tenn.) 161; *Bush v. St. Louis, etc., R. Co.*, 3 Mo. App. 62; *Wilson v. Adams Exp. Co.*, 27 Mo. App. 360; *The Huntress*, 2 Ware (U. S.) 89; *Congar v. Chicago, etc., R. Co.*, 24 Wis. 157, s. c. 1 Am. R. 164; *Ten Eyck v. Harris*, 47 Ill. 268, and *Massachusetts Cases* above cited. See, also, *ante*, §§ 1419, 1523.

taches, and many of the cases have been cited.<sup>1</sup> The question is one of difficulty. The two great lines of opposing decisions are commonly called respectively the "New Hampshire rule" and the "Massachusetts rule." The New Hampshire rule affirms that the liability of the company does not terminate until the arrival of the goods at the place to which they were shipped and a reasonable time is allowed the consignee in which to remove them,<sup>2</sup> while the Massachusetts rule affirms that the liability of the company as a common carrier terminates when the goods reach their destination and are delivered upon the platform, or other proper place, or placed in a warehouse or otherwise properly stored by the company.<sup>3</sup> We are inclined to think, although it is with hesitation that we venture to express an opinion, that the true rule is that the liability of the company as a common carrier does not end until the consignee has had reasonable time after the arrival of the goods at their place of destination to remove them, but that this rule is a general one broken by well marked exceptions. It can not be justly affirmed that a consignee is bound at all times to be at the station to receive the goods, inasmuch as it is a matter of common knowledge and, therefore, a matter judicially known to the courts, that freight trains because of a press of business, accidents and other causes do not always reach the station at the time fixed by the schedule, so that it can not be justly said that he is in fault for not being at the station, nor can it justly be said that the railroad company can expect him to be there. There is, it is obvious, an essential difference between railroad carriers who are provided with depots or warehouses and carriers who are not so pro-

<sup>1</sup> *Ante*, §§ 1463, 1464.

<sup>2</sup> *Ante*, § 1463; *Moses v. Boston, etc., R. Co.*, 32 N. H. 523; *Kennedy v. Mobile, etc., R. Co.*, 74 Ala. 430; *Columbus, etc., R. Co. v. Ludden*, 89 Ala. 612, s. c. 42 Am. & Eng. R. Cas. 404, 3 Lewis' Am. R. & Corp. R. 46, and authorities, note p. 55.

<sup>3</sup> *Ante*, § 1464; *Thomas v. Boston, etc., R. Co.*, 10 Met. 472; *Norway,*

*etc., Co. v. Boston, etc., R. Co.*, 1 Gray 263, s. c. 61 Am. Dec. 423; *Lake Erie, etc., R. Co. v. Hatch*, (Ohio St.) 11 Lewis' Am. R. & Corp. R. 611, notes p. 615. See, also, *Columbus, etc., R. Co. v. Ludden*, 89 Ala. 612, s. c. 42 Am. & Eng. R. Cas. 404, 3 Lewis' Am. R. & Corp. Rep. 46, and note 52-54; *Spears v. Spartanburg, etc., R. Co.*, 11 S. Car. 158.

vided and do not assume to possess such facilities. The railroad company from the time there is an effective delivery of the goods to it for transportation has entire charge and control of them, and neither the consignor nor the consignee can watch the movement of the goods nor directly control their movement by the carrier, neither can either of them know precisely when the transit has ended, but this the railroad company in contemplation of law, and in fact, does know. So, too, the railroad carrier is, as a rule, in a position to care for the goods, or should be in such position, while the consignee can not ordinarily (there may be, and, doubtless, are, exceptional instances), be assumed to be prepared to receive the goods immediately on their arrival at the place of destination. It is, therefore, just to hold that the company is not relieved from liability as a common carrier of goods until a reasonable time after their arrival at the place of destination has elapsed. The Massachusetts rule has been commended for the merit of being practicable and easy of application, but, with profound respect for the great judge by whom the rule was formulated, we think the fact that a rule is practicable and easy of application is not sufficient to outweigh the considerations of justice and public policy which undergird the doctrine that there must be a reasonable time for removal after the goods arrive at their destination. In view of the considerations which we have outlined it seems to us that a railroad company receiving goods for transportation impliedly undertakes that it will retain the goods in its capacity of a common carrier for such a reasonable length of time as will enable the consignee to remove them, but that the consignee must exercise reasonable care and diligence in removing them; otherwise the company will be liable as a warehouseman and not as a common carrier, that is, it ceases to be an insurer and is liable only in the event that the loss of the goods is caused by its negligence. The general rule, as we have said, must be subject to important exceptions. One of these exceptions is that where the consignee is at the station when the goods arrive, knows of their arrival, has opportunity to remove them and declines to do so he can not in-

sist that the company be held as a common carrier; he can not, indeed, insist that it be held even as a warehouseman if he is informed that the company can not store the goods.<sup>1</sup> So, when the goods are shipped to a place where there are no station buildings or warehouses the liability of the carrier terminates as soon as the goods are unloaded, or if left on the cars, are placed in a position ready for immediate delivery to the consignee.<sup>2</sup> We do not believe that it can be justly said that a railroad company is under an absolute duty to provide buildings for storing goods at all places where its freight trains stop, as, for example, an isolated rural stopping place where goods are very seldom received or discharged, and that a consignee has no right to assume that goods will be stored at such places. It is usually said that there are two lines of decisions, those we have discussed, but there is in fact a third line composed of the cases which affirm that it is the duty of the railroad company to give notice of the arrival of the goods.<sup>3</sup>

<sup>1</sup> *Smith v. Nashua, etc., R. Co.*, 27 N. H. 86, s. c. 59 Am. Dec. 364.

<sup>2</sup> *McMasters v. Pennsylvania R. Co.*, 69 Pa. St. 374; *South, etc., R. Co. v. Wood*, 66 Ala. 167.

<sup>3</sup> *Lake Erie, etc., R. Co. v. Hatch*, (Ohio St.), 11 Am. R. & Corp. R. (Lewis) 611; *Derosia v. Winona, etc., R. Co.*, 18 Minn. 133; *Pinney v. First Division of St. Paul, etc., R. Co.*, 19 Minn. 251; *Fenner v. Buffalo, etc., R. Co.*, 44 N. Y. 505; *Hedges v. Hudson River R. Co.*, 49 N. Y. 223; *McAndrew v. Whitlock*, 52 N. Y. 40; *Gleadell v. Thompson*, 56 N. Y. 194; *Pelton v. Rensselaer, etc., R. Co.*, 54 N. Y. 214; *Faulkner v. Hart*, 82 N. Y. 413; *McKinny v. Jewett*, 90 N. Y. 267; *Tarbell v. Royal Exchange, etc., Co.*, 110 N. Y. 170. See *Chicago, etc., R. Co. v. Scott*, 42 Ill. 132; *Michigan, etc., R. Co. v. Ward*, 2 Mich. 538; *Buckley v. Great Western, etc., R. Co.*, 18 Mich. 121; *McMillan v. Michigan, etc., R. Co.*, 16 Mich. 79; *Mitchell v. Lanca-*

*shire, etc., Railway Co.*, 10 L. R. Q. B. 256; *Tanner v. Oil Creek, etc., R. Co.*, 53 Pa. St. 411. In the case of *North Pennsylvania, etc., R. Co. v. Commercial, etc., Bank*, 123 U. S. 727, s. c. 8 Sup. Ct. R. 266, it was said in speaking of a provision of the bill of lading requiring carrier to notify the consignees that: "If they were the consignees, the direction to notify them would be entirely unnecessary, because the duty of the carrier is to notify the consignee on the arrival of the goods at their place of destination." The question as to the duty to give notice in order to terminate the liability of the railroad company as a carrier was not before the court and we do not think the decision in the case referred to can be regarded as authoritative adjudication that there is a duty to give notice or that notice must be given in order to terminate the duty of a railroad company as a common carrier of goods. In the case of

These cases, in effect, add to the rule that reasonable time must be given the consignee in which to remove the goods, another duty, namely, that of giving notice. There is reason for affirming that it is not essential in order to terminate the liability of a railroad company as a common carrier that it should give notice to the consignee of the arrival of the goods, since, as it seems to us when the goods are carried to their destination, there stored and a reasonable time allowed the consignee to remove them, the railroad company has performed the duty imposed upon it as a common carrier, and after it has done these things it holds the goods as a warehouseman and as such is liable for the loss of the goods where the loss is caused by its negligence or that of its employes. In other words, is still under a duty but is not an insurer. The general rule is that the duty of diligence and care is a reciprocal one and it is not easy to perceive why this rule does not make it the duty of the consignee to exercise diligence to ascertain when the goods have arrived and to remove them within a reasonable time after their arrival. There are, however, reasons for the opposite view, and these reasons have been presented in some of the cases we have cited. It is true that the rule requiring a personal delivery of the goods has been abrogated but this is due to a change in the mode of transportation, and it seems to us that of this change the consignee must take notice and do what the change makes necessary, and that one of the consequences of the change is that when goods have arrived at the place of destination, have been there stored and a reasonable length of time allowed for their removal, the liability of the company as an insurer is at an end. But it is with hesitation that we venture an opinion for we fully recognize the fact that the question is a close one and that able courts have given opinions antagonistic to the rule we incline to favor. Circumstances or custom may make it essential to the termination of the liability of a railroad company that it should give

The *Thames*, 14 Wall. 98, language is used which indicates that notice to the consignee is necessary to terminate the liability as a common carrier, but the point was not directly decided.

notice to the consignee of the arrival of the goods at the place of destination but as indicated we think that as a matter of law, it can not be said that the termination of liability as a carrier is in all cases dependent upon notice to the consignee of the arrival of the goods. It may be necessary to give notice and make inquiry where the consignee is unknown and claim to the goods is made by a person not known to the carrier,<sup>1</sup> but it does not necessarily follow from this that the liability of the company is anything more than that of a warehouseman in cases where it stores the goods and gives the consignee a reasonable time in which to remove them. It is true that the decisions in reference to carriers by water<sup>2</sup> and those in reference to carriers of packages require notice, but it seems to us that those decisions can not be applied to railroad companies, at least in cases where the only question is when their liability as common carriers ends and that of a warehouseman begins. The adjudged cases recognize the force of usage and custom and affirm that custom may require notice or may dispense with notice.<sup>3</sup> Usage and custom, it may be said in passing, are always important factors in controversies involving the rights and duties of railroad carriers.<sup>4</sup> Notice to an agent of the con-

<sup>1</sup> *The Thames*, 14 Wall. 98.

<sup>2</sup> *Liverpool, etc., Co. v. Snitter*, 17 Fed. R. 695; *Richardson v. Goddard*, 23 How. 28; *De Grau v. Wilson*, 17 Fed. R. 698; *Zinn v. New Jersey Steamboat Co.* 49 N. Y. 442. See, *Sherman v. Hudson River R. Co.*, 64 N. Y. 254; *Union, etc., Co. v. Knapp*, 73 Ill. 506.

<sup>3</sup> *Gibson v. Culver*, 17 Wend. (N. Y.) 305; *Richmond, etc., R. Co. v. White*, 88 Ga. 805, s. c. 15 S. E. R. 802; *Russell Mfg. Co. v. New Haven, etc., Co.*, 52 N. Y. 657; *Burlington, etc., R. Co. v. Arms*, 15 Neb. 69, s. c. 17 N. W. R. 351.

<sup>4</sup> *Russell, etc., Co. v. New Haven Steamboat Co.*, 50 N. Y. 121; *Ely v. New Haven Steamboat Co.*, 53 Barb. 207; *Gibson v. Culver*, 17 Wend. 305;

*Ostrander v. Brown*, 15 Johns. 39; *Farmers', etc., Bank v. Champlain, etc., Co.*, 16 Vt. 52; *Van Santvoord v. St. John*, 6 Hill 157; *Stone v. Rice*, 58 Ala. 95; *McMasters v. Pennsylvania R. Co.*, 69 Pa. St. 374. Usage may be shown upon the question of the mode of delivery and kindred questions, and is of much importance in cases of the class referred to. *Hooper v. Chicago, etc., R. Co.*, 27 Wis. 81; *Hodgdon v. New York, etc., R. Co.*, 46 Conn. 277; *New Orleans, etc., R. Co. v. Hurst*, 36 Miss. 660; *Whitehouse v. Halstead*, 90 Ill. 95; *Crawford v. Clark*, 15 Ill. 561; *Sleade v. Payne*, 14 La. Ann. 453; *McKeon v. See*, 4 Rob. (N. Y.) 449; *Gatliffe v. Bourne*, 4 Bing. N. C. 314; *Tierney v. New York, etc., R. Co.*, 76 N. Y. 305; *Peel v. Chicago, etc.,*



signee is sufficient in cases where the agent is authorized to act for the consignee, especially if the consignee is absent and can not be found. The proposition stated is, of course, not a debatable one, but the controversy is as whether the person to whom the notice was given was an agent acting within the scope of his authority.<sup>1</sup>

§ 1528. **Reasonable time to inspect and remove.**—Where the rule of the jurisdiction in which the case arises requires that reasonable time be given the consignee, after the arrival of the goods, in which to remove them, the question of what is a reasonable time is one of importance. In determining what is a reasonable time, regard must be had to the requirements of commerce, to usage and custom,<sup>2</sup> and to the demands of business, for both the carrier and consignee must be deemed to contract and to act with reference to such matters. Their respective rights and duties can not be justly ascertained and determined without giving to such matters due consideration. On the one hand the carrier is chargeable with notice that the affairs of commerce and business require that it keep the goods for the consignee for such a time as will enable him to remove them, while, on the other hand, the consignee is bound to know that the course of business and the requirements of commerce impose upon him the duty of exercising diligence in removing the goods. The duty of the railroad carrier being a public one, a consignee can not, by want of care or diligence, hinder or embarrass it in the performance of that duty. There are cases in which the question whether a reasonable time has been allowed in which to remove the goods is a question of

R. Co., 20 Wis. 594; Missouri Pac. R. Co. v. Fagan, 72 Tex. 127, s. c. 9 S.W. R. 749; Leonard v. Fitchburg R. Co., 143 Mass. 307. See, generally, as to the effect of usage or custom in relation to the duties of carriers, Bush & Son's Co. v. Thompson, 65 Fed. R. 812; Good v. Chicago, etc., R. Co., (Iowa) 60 N. W. R. 631; Mundy v. Louisville, etc., R. Co., 67 Fed. R. 633;

Constable v. National, etc., Co., 154 U. S. 51, s. c. 14 Sup. Ct. R. 1062; Pennsylvania R. Co. v. Stern, 119 Pa. St. 24; Weyand v. Atchison, etc., R. Co., 75 Iowa 573, s. c. 39 N. W. R. 899.  
<sup>1</sup> *Ante*, § 1524; Burdett v. Canadian, etc., R. Co., 10 Manitoba 5; Collins v. Alabama, etc., R. Co., 104 Ala. 390, s. c. 16 So. R. 140.

<sup>2</sup> *Ante*, § 1527.

fact, but in many, perhaps in most, instances, where the facts are undisputed, it must be, it seems to us, a question of law,<sup>1</sup> inasmuch as matters of which the courts take judicial notice enter so largely into it. We think it may be safely said that the general rule is that where the facts are undisputed and but one reasonable inference can be drawn from them, or, perhaps, where the controversy is controlled by custom and usage, or depends upon facts of which the court takes judicial knowledge, the question is one of law, but in other cases it is one of fact.<sup>2</sup> It has been said that "what is meant by a reasonable time is such as would give a person residing at the place to which the goods are consigned, and informed of the usual course of business on the part of the company, a suitable opportunity within business hours after the goods are ready for delivery, to come to the place of delivery, inspect the goods and take them away."<sup>3</sup> The definition we have quoted, while in the main an accurate one, is not free from objections. It can not be justly said that the person to whom the goods are consigned must necessarily be informed of the company's usual course of business, for knowing himself to be consignee he must, as we conceive, exercise reasonable care and diligence in removing the goods, whether informed as to the company's usual course of business or not, although such information, if he possessed it, would exercise an important influence upon the question of whether a reasonable time in which to remove the goods had elapsed.<sup>4</sup> It is held in many of the cases that the consignee

<sup>1</sup> Elliott's Gen. Prac., § 442, n. 2.

<sup>2</sup> *Roth v. Buffalo, etc., R. Co.*, 34 N. Y. 548; *Hedges v. Hudson River R. Co.*, 49 N. Y. 223; *Derosia v. Winonia, etc., R. Co.*, 18 Minn. 133; *Lemke v. Chicago, etc., R. Co.*, 39 Wis. 449; *Parker v. Milwaukee, etc., R. Co.*, 30 Wis. 689; *Collins v. Alabama, etc., R. Co.*, 104 Ala. 390, s. c. 16 So. R. 140, 61 Am. & Eng. R. Cas. 229; *The Steamer Kathleen Mary*, 8 Benedict 165; *Fenner v. Buffalo, etc., R. Co.*, 44 N. Y. 505; *Wood v. Crocker*, 18 Wis. 345; *Jeffersonville, etc., R. Co. v. Cleveland*, 2

*Bush*, 468; *Buckley v. Great Western, etc., R. Co.*, 18 Mich. 121; *Maignan v. New Orleans, etc., R. Co.*, 24 La. Ann. 333; *Faulkner v. Hart*, 82 N. Y. 413.

<sup>3</sup> *Pinney v. First Division of St. Paul, etc., R. Co.*, 19 Minn. 251.

<sup>4</sup> Mr. Wood says: "The rule may perhaps be better stated to be, that the liability of a carrier, as such, continues until the goods are ready to be delivered at their place of destination, and the consignee has had a reasonable opportunity, during the hours when such goods are usually deliv-

must have a reasonable opportunity to inspect the goods.<sup>1</sup> Some of the cases hold that the carrier may permit the consignee to take away the goods for the purpose of inspection, but, of course, when the goods are removed by the consignee and are rightfully in his possession, there is no liability on the part of the carrier. It is barely necessary to suggest that if there is no right to permit the goods to be taken by the consignee, and loss is caused the consignor by the wrong of the railroad carrier in suffering the consignee to obtain possession of the goods, it will be liable to the consignor. We doubt whether it can be justly held that the consignee, as against the carrier, can rightfully insist upon permission to make a minute inspection, and we think that when the term "inspect" or the term "inspection" is used by the courts, it means no more than that the consignee shall have a right, if he demands it, to make a general examination of the goods. The decisions which declare and enforce the right of inspection where goods are shipped "C. O. D.," can not, in all their scope at least, apply in other cases.

**§ 1529. Rule where goods are to be held until called for.**—The rules which determine the duty of the carrier in regard to the delivery of goods in the absence of any specific contract upon the subject may, of course, be inapplicable where there is an express contract. Thus, it is sometimes provided that the goods shall be held until called for. This does not bind

ered, in which to examine them so far as to judge of their outward appearance, and to remove them. As to what constitutes a reasonable opportunity, it may be said that no reference is to be had to the peculiar circumstances of the consignee, but the question is whether he had an opportunity such as would give a person residing in the vicinity of the place of delivery, and informed of the usual course of the business and the time when the goods are expected to ar-

rive, suitable time within the business hours to take them away."

<sup>1</sup> Hutchinson on Carriers, § 293; Ray Negligence of Imposed Duties, Freight Carriers, 906, citing Meyer v. Lemcke, 31 Ind. 208; Old Colony, etc., Co. v. Wilder, 137 Mass. 536; Murray v. Warner, 55 N. H. 546, s. c. 20 Am. R. 227; Union, etc., Co. v. Riegel, 73 Pa. St. 72; American Express Co. v. Lesem, 39 Ill. 312; Great Western, etc., R. Co. v. Crouch, 3 Hurlst. & N. 183.

the carrier to keep them forever, but it is bound to hold them for a reasonable time, and after the expiration of a reasonable time for the consignee to call for and receive them it is held that the liability of the carrier as such is terminated.<sup>1</sup> So, if the carrier has agreed to keep the goods for a certain time it may, at the expiration of such time, deliver them to a warehouseman for the owner, and such warehouseman will not be deemed to be the agent of the carrier so as to render it liable for his negligence.<sup>2</sup>

**§ 1530. Rule where goods are not to be delivered until paid for.**—A common carrier is not obliged to collect or require the payment of the purchase price of goods offered to it for transportation before delivering them to the purchaser, as one of its common law duties; but where it expressly agrees to do so, or accepts a consignment of goods with instructions not to deliver them until paid for, it becomes the agent of the consignor to collect the money and is liable if it delivers the goods without doing so.<sup>3</sup> The undertaking may be either express or implied. Thus, it has been held that where it receives goods marked "C. O. D." and so bills them, it is its duty to collect on delivery and return the charges to the consignor, especially where it is shown to be the custom to do so when goods are so marked.<sup>4</sup> But such an undertaking is not always implied from the mere acceptance of goods so marked, without anything in the bill of lading or receipt to show it.<sup>5</sup> So, where the carrier accepted the consignee's check in payment

<sup>1</sup> *Chapman v. Great Western, etc., R. Co.*, 42 L. T. R. N. S. 252.

<sup>2</sup> *Bickford v. Metropolitan, etc., Co.*, 109 Mass. 151.

<sup>3</sup> *Cox v. Columbus, etc., R. Co.*, 91 Ala. 392, s. c. 8 So. R. 824, 49 Am. & Eng. R. Cas. 111, and note; *Meyer v. Lemcke*, 31 Ind. 208; *Old Colony R. Co. v. Wilder*, 137 Mass. 536; *Jellett v. St. Paul, etc., R. Co.*, 30 Minn. 265, s. c. 16 Am. & Eng. R. Cas. 246.

<sup>4</sup> *United States Exp. Co. v. Keefer*, 59 Ind. 263; *Cox v. Columbus, etc.,*

*R. Co.*, 91 Ala. 392, s. c. 8 So. R. 824, 49 Am. & Eng. R. Cas. 111, and note; *Murray v. Warner*, 55 N. H. 546; *American Exp. Co. v. Lesem*, 39 Ill. 312.

<sup>5</sup> *Chicago, etc., R. Co. v. Merrill*, 48 Ill. 425; *Rennie v. Northern R. Co.*, 27 U. C. C. P. 153. It has also been held that a local station agent has no authority to make such an agreement and render the company liable for its performance. *Cox v. Columbus, etc., R. Co.*, 91 Ala. 392, s. c. 8 So. R. 824.

and sent it to the consignor, it was held that the unconditional acceptance of it by the consignor, without objection, was a waiver of collection in money and a ratification of the carrier's act, and that he could not recover in an action against the carrier.<sup>1</sup> A reasonable time should be allowed the purchaser to inspect the goods and make the payment, and the carrier can not be held liable on account of its compliance with this rule.<sup>2</sup> After tender of the goods and refusal to accept them the carrier is liable only as warehouseman.<sup>3</sup> It may then return them to the consignor or give notice to him and await his instructions.<sup>4</sup> It is also customary to send bills of lading to the shipper's order with drafts attached, and instructions to "notify" the purchaser. This has been held to be a plain indication that the goods are not to be delivered to such person without the production of the bill of lading,<sup>5</sup> and so it has been held that the mere fact that a draft upon the consignee is attached to a bill of lading indicates an intention that the goods are not to be delivered until the draft is paid.<sup>6</sup>

§ 1531. **Waiver by consignee.**—If one to whom goods are shipped accepts them without objection when delivered at an improper time or place, or in an improper manner he thereby waives any objections on account of the place, time, or manner of delivery.<sup>7</sup> So, if they are delivered, at his request, or

<sup>1</sup> *Rathbun v. Citizens' Steamboat Co.*, 76 N. Y. 376, distinguishing *Walker v. Walker*, 5 Heisk. (Tenn.) 425.

<sup>2</sup> *Aaron v. Adams Exp. Co.*, 27 Weekly L. Bull. 183; *Great Western, etc., R. Co. v. Crouch*, 3 Hurlst. & N. 183; *Lyons v. Hill*, 46 N. H. 49; *Herrick v. Gallagher*, 60 Barb. (N. Y.) 566; *Avery v. Stewart*, 2 Conn. 69; *Ish-erwood v. Whitmore*, 11 M. & W. 347.

<sup>3</sup> *Marshall v. American Exp. Co.*, 7 Wis. 1, s. c. 73 Am. Dec. 381; *Gibson v. American, etc., Exp. Co.*, 1 Hun (N. Y.) 387; *Storr v. Crowley*, *McClell. & Y.* 129.

<sup>4</sup> *Hutchinson on Carriers*, (2d ed.)

§ 392. See *American Exp. Co. v. Greenhalgh*, 80 Ill. 68.

<sup>5</sup> *Ante*, § 1427.

<sup>6</sup> *Wells v. Oregon, etc., R. Co.*, 32 Fed. R. 51. See, also, *McEwen v. Jeffersonville, etc., R. Co.*, 33 Ind. 368; *Joslyn v. Grand Trunk R. Co.*, 51 Vt. 92.

<sup>7</sup> *Sweet v. Barney*, 23 N. Y. 335; *Jewell v. Grand Trunk R. Co.*, 55 N. H. 84; *Cleveland, etc., R. Co. v. Sargent*, 19 Ohio St. 438; *Bartlett v. Steamboat Philadelphia*, 32 Mo. 256; *Lewis v. Western R. Co.*, 11 Metc. (Mass.) 509; *Hill v. Humphreys*, 5 Watts & S. (Pa.) 123; *Converse v. Boston, etc.,*

upon his order, at some other place than that to which they were shipped.<sup>1</sup> There may also be a waiver where the owner rightfully resumes control of the goods or knowingly ratifies a wrong delivery.<sup>2</sup> But the mere fact that the consignee accepts a portion of the goods at an improper place will not necessarily operate to release the carrier from its obligation to properly deliver the remainder.<sup>3</sup>

§ 1532. **Carrier's right to receipt or surrender of bill of lading.**—Although a railroad company should usually require the production of the bill of lading before it delivers goods to the person demanding them, yet it is not entitled under all circumstances to insist upon the surrender and cancellation of the bill of lading as a condition precedent to the delivery of the property.<sup>4</sup> But where the statute prohibits the delivery unless the bill of lading is surrendered and canceled a delivery to the consignee in violation of the statute will not protect the carrier as against one to whom the bill of lading has been assigned.<sup>5</sup> So, we think it clear that, even if the carrier is not entitled to the surrender and cancellation of the bill of lading, it is entitled, ordinarily to its production or presentation as evidence of the right of the person demanding the goods to receive them, and that it may also require him to give it a receipt upon the delivery of the goods.<sup>6</sup>

R. Co., 58 N. H. 521. So held where the goods were delivered to the wrong person and the consignee ratified it. *O'Dougherty v. Boston, etc., R. Co.*, 1 T. & C. (N. Y.) 477.

<sup>1</sup> *London, etc., R. Co. v. Bartlett*, 31 L. J. Exch. 92, s. c. 7 H. & N. 400; *Strong v. Nataly*, 4 B. & P. (1 New R.) 16. See, also, *Dobbin v. Michigan Cent. R. Co.*, 56 Mich. 522, s. c. 21 Am. & Eng. R. Cas. 85.

<sup>2</sup> *Stone v. Waitt*, 31 Me. 409; *Dobbin v. Michigan Cent. R. Co.*, 56 Mich. 522, s. c. 21 Am. & Eng. R. Cas. 85; *Brasher v. Denver, etc., R. Co.*, 12 Col. 384; *Reynolds v. New York, etc., R. Co.*, 3 N. Y. Supp. 331;

*Converse v. Boston, etc., R. Co.*, 58 N. H. 521. But see *Sanquer v. London, etc., R. Co.*, 16 C. B. 163.

<sup>3</sup> *Cox v. Peterson*, 30 Ala. 608; *Home Ins. Co. v. Western Transp. Co.*, 51 N. Y. 93.

<sup>4</sup> *Gulf, etc., R. Co. v. McCown*, (Tex. Civ. App.) 25 S. W. R. 435, (rehearing granted on another ground in 26 S. W. R. 745); *Dwyer v. Gulf, etc., R. Co.*, 69 Tex. 707, s. c. 7 S. W. R. 504.

<sup>5</sup> *Colgate v. Pennsylvania Co.*, 102 N. Y. 120.

<sup>6</sup> See *Bass v. Glover*, 63 Ga. 745; *Skinner v. Chicago, etc., R. Co.*, 12 Iowa 191.

§ 1533. **Duty to store—Liability as warehouseman.**—We have elsewhere treated in a general way of the liability of a railroad carrier in possession of goods in the capacity of a warehouseman,<sup>1</sup> and it is not our purpose to repeat what was there said. The general rule is that the duty of a railroad company does not end with the arrival of the goods at the place to which they were shipped, for it is incumbent upon the carrier to exercise reasonable care and diligence to prevent injury to the goods by storing or otherwise protecting them,<sup>2</sup> but when it has performed its duty as a carrier and then warehouses the goods its responsibility is not the extraordinary one which the law imposes upon common carriers.<sup>3</sup> It remains liable, not, however, as a common carrier but as a bailee for hire.<sup>4</sup> The reasoning of the courts which assert that the company is bound to warehouse is that the circumstances under which the goods came into its possession are such as to imply an undertaking on its part to exercise reasonable care to protect them from injury.<sup>5</sup> We do not think that the cases which hold that

<sup>1</sup> *Ante*, §§ 1463, 1464.

<sup>2</sup> *Rice v. Boston, etc., R. Co.*, 98 Mass. 212; *The Captain John*, 33 Fed. R. 927; *Farmers' Loan, etc., Co. v. Oregon, etc., R. Co.*, 73 Fed. R. 1003; *Rice v. Hart*, 118 Mass. 201, s. c. 19 Am. R. 433; *St. Louis, etc., R. Co. v. Flannagan*, 23 Ill. App. 489. *Adams, etc., Co. v. Cressap*, 6 Bush 572; *Aldridge v. Great Western, etc., R. Co.*, 15 C. B. (N. S.) 582; *Independence, etc., Co. v. Burlington, etc., R. Co.*, 72 Iowa 535, s. c. 2 Am. St. R. 258.

<sup>3</sup> *Ante*, §§ 1463, 1464; *Arthur v. St. Paul, etc., R. Co.*, 38 Minn. 95, s. c. 35 N. W. R. 719; *Gleadell v. Thomson*, 56 N. Y. 194; *Gatliffe v. Bourne*, 4 Bing. N. C. 314; *Union, etc., R. Co. v. Moyer*, 40 Kan. 184, s. c. 10 Am. St. R. 183; *Missouri, etc., R. Co. v. Haynes*, 72 Tex. 175; *Kansas City, etc., R. Co. v. Morrison*, 34 Kan. 502, s. c. 55 Am. R. 252; *Aldrich v. Boston, etc., R. Co.*, 100 Mass. 31, s. c. 97 Am. Dec. 74; *Alabama, etc., R. Co. v.*

*Grabfelder*, 83 Ala. 200; *Anniston, etc., R. Co. v. Ledbetter*, 92 Ala. 326. The effect of part delivery was considered in a recent case and it was held that there was no such a delivery as terminated the duty of the railroad company as a common carrier. *Jeffris v. Fitching R. Co.*, (Wis.) 67 N. W. R. 424. As elsewhere shown the rule is that while the goods are stored by a railroad company during transit, and as incident thereof, its liability is that of a common carrier. *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318.

<sup>4</sup> As to when the duty of the company as a common carrier ends is not here considered.

<sup>5</sup> *Smith v. Nashua, etc., R. Co.*, 27 N. H. 86, s. c. 59 Am. Dec. 364. Citing as to the implied duty. *Ostrander v. Brown*, 15 John. 39, s. c. 8 Am. Dec. 211; *Fisk v. Newton*, 1 Denio 45, s. c. 43 Am. Dec. 649. See *Deming v. Merchants', etc., Co.*, 33 Am. L. Reg. 391.

payment of charges may be deemed compensation for warehousing are well decided, for the reason that, except where storage is part of the transportation, the company is entitled to compensation for storage. There may, it is obvious, be additional charges where the goods are held a considerable time or where there is a right to demurrage, terminal charges or the like. While it is the general rule that it is the duty of a railroad company to store or warehouse goods the rule is by no means free from exceptions. The goods may be such as can not be stored as, for instance, coal, stone or the like, and in such cases it seems clear to us that there is no duty to warehouse.<sup>1</sup> So the conduct of the consignee may relieve the company from the duty to store. Thus, where the consignee was present when the goods arrived, was notified to take them and was informed that the company could not store them it was held that there was no obligation to warehouse the goods,<sup>2</sup> but if the company was able to store the goods and the consignee was not prepared to remove them the doctrine of the case cited would probably not apply.

<sup>1</sup>The expressions found in some of the books asserting that there is always a duty to warehouse may correctly state the rule as to carriers of packages or the like but they do not correctly state it where the articles carried by a railroad company are such as are not capable of being stored or such as are not usually stored.

<sup>2</sup>*Smith v. Nashua, etc., R. Co.*, 27 N. H. 86, s. c. 59 Am. Dec. 364.



## CHAPTER LXIII.

### EXCUSES FOR FAILURE TO DELIVER.

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| <p>§ 1534. Difference between cases not within the scope of duty and cases involving excuses for non-delivery.</p> <p>1535. Excuses for non-delivery arising from acts of the shipper, owner or consignee.</p> <p>1536. Countermanding original shipping directions—Change of instructions.</p> <p>1537. Seizure under legal process—Generally.</p> <p>1538. Attachment—Garnishment.</p> <p>1539. Stoppage <i>in transitu</i>—General doctrine.</p> | <p>1540. Who may exercise the right of stoppage <i>in transitu</i>.</p> <p>1541. Against whom the right of stoppage <i>in transitu</i> may be exercised.</p> <p>1542. Mode of exercising the right of stoppage <i>in transitu</i>—Duty of carrier to give notice.</p> <p>1543. Termination of the right of stoppage <i>in transitu</i>.</p> <p>1544. Adverse claimants—Procedure on part of carrier—Interpleader.</p> |
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§ 1534. Difference between cases not within the scope of duty and cases involving excuses for non-delivery.—It is often said that a railroad carrier is excused for a failure to deliver goods when the failure is caused by the *vis major*, or the act of God, by the act of public enemies, or by public authority, but it seems to us that strict accuracy requires it to be said that the undertaking of a common carrier, unless there is an express contract, does not cover or embrace loss or injury due to such causes, so that where the loss or injury directly results without fault on the part of the carrier from such causes it is not covered or embraced by its undertaking and hence there is no breach of duty, and, for that reason no liability, but, whatever may be the true ground on which the conclusion rests, it is true beyond controversy that a carrier, free from fault, is not liable for a failure to deliver in cases where the failure is attributable to any of the causes above enumerated. But it is important to remember that where the fault of the railroad

carrier concurs in producing the loss or injury it can not avail itself of a defense founded upon any of the causes mentioned, since the negligence of the carrier will be adjudged to be the proximate cause of the loss or injury.<sup>1</sup> The duty of the carrier does not cover injuries resulting from the inherent nature of the goods, improper packing or the fraud of the shipper, although there may be a liability, not, however, as an insurer, but for loss caused by the carrier's negligence.<sup>2</sup> The examples we have given are sufficient to show that there is a difference between cases where the scope of the carrier's duty is not such as to make it liable for the loss, and cases where there is a duty but a valid excuse for non-delivery. This difference, as we believe, supplies a sound foundation for the cases which affirm that where the carrier shows that the loss was due to one of the causes which the law declares shall exonerate it from liability it need not go further and prove that it was not guilty of negligence.<sup>3</sup> Where, however, the loss is one from which the law does not exonerate the carrier or from which the contract does not relieve it, and the defense is founded upon an excuse for non-delivery then we think the burden is on the carrier to show the excuse.

**§ 1535. Excuses for non-delivery arising from acts of the shipper, owner or consignee.**—Where the fault or mistake of the shipper<sup>4</sup> is the cause of the failure to deliver, the carrier is excused unless guilty of negligence.<sup>5</sup> The mistake or negli-

<sup>1</sup> *Ante*, § 1457. *Nugent v. Smith*, L. R. 1 C. P. D. 19; *Powers v. Davenport*, 7 Blackf. 497; *Robinson v. Dunmore*, 2 B. & P. 416.

<sup>2</sup> *Ante*, § 1492.

<sup>3</sup> *Ante*, § 1516; *Railroad Co. v. Reeves*, 10 Wall. 176; *New Jersey, etc., Co. v. Merchants' Bank*, 6 How. 344; *Transportation Co. v. Downer*, 11 Wall. 129; *Hunt v. The Propeller Cleveland*, 6 McLean 76; *Christie v. The Craigton*, 41 Fed. R. 62. But as elsewhere shown there is stubborn conflict upon this question.

<sup>4</sup> *Ante*, §§ 1489-1492; *Southern, etc., Co. v. Kaufman*, 12 Heisk. 161; *Erie, etc., R. Co. v. Wilcox*, 84 Ill. 239; *Lake Shore, etc., R. Co. v. Hodapp*, 83 Pa. St. 22; *Stimson v. Jackson*, 58 N. H. 138; *Congar v. Chicago, etc., R. Co.*, 24 Wis. 157, s. c. 1 Am. R. 164; *Montgomery, etc., R. Co. v. Culver*, 75 Ala. 587; *Cooper v. Georgia, etc., R. Co.*, 92 Ala. 329, s. c. 9 So. R. 159.

<sup>5</sup> *Mahon v. Blake*, 125 Mass. 477; *Guillaume v. General Transportation Co.*, 100 N. Y. 491; *O'Rourke v. Chicago, etc., R. Co.*, 44 Iowa 526.

gence of the shipper in marking or directing the goods or in like matters relieves the carrier, since the performance of such acts is no part of the duty imposed by law upon the carrier, but where the carrier knows that a mistake has been made then it is under a duty to use reasonable care and diligence to prevent loss or injury from resulting from such mistake. If there is such a mistake shown then the burden of showing negligence, and that it was the proximate cause of the loss, is upon the shipper or the consignee. The conclusion which we have just stated is not opposed to the rule that proof of loss ordinarily makes a *prima facie* case, for it implies that the railroad carrier has the burden of showing an excuse for a failure to deliver but affirms that it destroys the *prima facie* case when it shows that the loss was caused by the negligence, fault or wrong of the shipper or consignee. It is unquestionably the rule, in cases where there are no contract stipulations limiting liability, that where a loss is shown after complete delivery of the goods to the carrier, the presumption is against the carrier,<sup>1</sup> but this presumption is, of course, a rebuttable one and is overcome when it is shown that there was such fault or wrong on the part of the shipper or consignee, and when the presumption is overthrown the plaintiff's case is gone, unless negligence on the part of the carrier is established. There must, of course, be evidence of delivery and of loss or the presumption will not arise.<sup>2</sup> It is clear that where the consignee is not ready or

<sup>1</sup> *Rogers v. Head*, Cro. Jac. (4 Croke) 262; *Ross v. Hill*, 2 C. B. 877; *Harris v. Costar*, 1 C. & P. 636; *Dudley v. Smith*, 1 Camp. 167; *Beauchamp v. Powley*, 1 M. & Rob. 38; *Cairns v. Robins*, 8 M. & W. 258; *Campagnie, etc., R. Co. v. Fortier*, (Montreal) L. R. 5 Q. B. 224; *Southern, etc., Co. v. Seide*, 67 Miss. 609; *Chicago, etc., R. Co. v. Dickinson*, 74 Ill. 249; *Montgomery, etc., R. Co. v. Moore*, 51 Ala. 394; *Whitesides v. Russell*, 8 Watts & S. 44; *Little v. Boston, etc., R. Co.*, 66 Me. 239; *Adams, etc., Co. v. Haynes*, 42 Ill. 89; *Adams, etc., Co.,*

*v. Stettaners*, 61 Ill. 184; *American, etc., Co. v. Sands*, 55 Pa. St. 140; *Davidson v. Graham*, 2 Ohio St. 131. But see *Canfield v. Baltimore, etc., R. Co.*, 75 N. Y. 144; *Hussey v. The Saragossa*, 3 Woods (U. S. C. C.) 380; *Laffrey v. Grummond*, 74 Mich. 186.

<sup>2</sup> *Cooper v. Georgia, etc., R. Co.*, 92 Ala. 329, s. c., 9 So. R. 159; *Tucker v. Cracklin*, 2 Stark. 339; *Woodbury v. Frink*, 14 Ill. 279; *Griffiths v. Lee*, 1 Car. & P. 110; *Wood's Browne on Carriers*, p. 334; 2 *Greenleaf on Ev.*, § 213.

able to receive the goods delivery will be excused, but in such cases there is ordinarily the duty of a warehouseman resting on the railroad company although the extraordinary duty of a common carrier terminates<sup>1</sup> when there is ability and readiness on the part of the company to deliver and inability or refusal on the part of the consignee to receive the goods.<sup>2</sup> We think that where it is the duty of the person insisting upon a delivery to produce the bill of lading and he fails or refuses to do so non-delivery is excused and that the excuse has for its basis the act of the party.<sup>3</sup> It is proper in this connection to direct attention to the rigorous rule against common carriers which prevails in cases where goods are delivered to persons to whom they are consigned under fictitious names, and in cases where a swindler or an impostor procures the owner to consign goods to him.<sup>4</sup> The rule to which we refer as applied in some of the cases trenches upon the rule which protects carriers in cases where the negligence or wrong of the shipper is the cause of the loss, for many of the cases affirm that a railroad carrier must at its peril deliver the goods to the proper person. Some of the cases carry the rule very far, and a failure to deliver is held not to be excused where the delivery is to a person who has assumed a fictitious name or is an impostor or a swindler, and this, according to some of the cases, is so

<sup>1</sup> The *Reuben Doud*, 46 Fed. 800; *Cahn v. Michigan, etc., R. Co.*, 71 Ill. 96; *Cincinnati, etc., R. Co. v. McCool*, 26 Ind. 140. See, *Independence, etc., Co. v. Burlington, etc., R. Co.*, 72 Iowa 535; *Mohr v. Chicago, etc., R. Co.*, 40 Iowa 579.

<sup>2</sup> We do not at this place enter the field of conflict wherein the cases so stoutly fight over the question whether in order to constitute complete delivery by the carrier, notice must be given the consignee. We simply affirm that where there is ability and readiness to deliver, including therein all acts required to constitute a delivery by the carrier, the failure to

deliver is excused by the act of the consignee.

<sup>3</sup> *Ante*, §§ 1427-1429. See, *Pennsylvania Co. v. Stern*, 119 Pa. St. 24; *Dows v. National, etc., Bank*, 91 U. S. 618; *Cox v. Columbus, etc., R. Co.*, 91 Ala. 392; *Farmers', etc., Bank v. Logan*, 74 N. Y. 568; *North, etc., R. Co. v. Commercial Bank*, 123 U. S. 727; *Louisville, etc., R. Co. v. Barkhouse*, 100 Ala. 543.

<sup>4</sup> A striking illustration of the rigor of the rule is supplied by the case of *Pacific, etc., Co. v. Shearer*, 160 Ill. 215. See the comments on that decision in the *National Corp. R.*, July 23, 1876, for collection of cases.

even though the act of the owner may have had an important influence in misleading the carrier, and the carrier may have acted in the utmost good faith.<sup>1</sup> But there are cases affirming, justly as we believe, that the acts of the owner, although there may be fraud and imposture, may be such as to excuse the failure to deliver.<sup>2</sup> We do not at this place enter into a discussion of the doctrine of the cases referred to, since our immediate purpose is simply to direct attention to the fact that the rule that the carrier is excused where the failure to deliver is caused by the act of the owner or consignor is not to be extended to all cases wherein it may seem that the act of the owner caused the failure to duly deliver goods.

§ 1536. **Countermanding original shipping directions—Change of instructions.**—Where goods are brought to a common carrier by one who appears to be the owner, and there are no facts or circumstances indicating that he is not the owner, the carrier has a right, and, indeed, is bound to, obey shipping directions or instructions given at the time goods are accepted for transportation,<sup>3</sup> but after the goods have been accepted and the duty of transportation undertaken, the question

<sup>1</sup> *Duff v. Budd*, 3 Brod. & B. 177; *Stephenson v. Hart*, 4 Bing. 476; *Ross v. Johnson*, 5 Burr. 2825; *Brown v. Hodgson*, 4 Taunt. 189; *Meyer v. Chicago*, etc., R. Co., 24 Wis. 566; *Winslow v. Vermont*, etc., R. Co., 42 Vt. 700; *American*, etc., Co. v. *Stack*, 29 Ind. 27; *McEntee v. New Jersey*, etc., Co., 45 N. Y. 34; *Southern*, etc., Co. v. *Crook*, 44 Ala. 468; *Southern*, etc., Co. v. *Van Meter*, 17 Fla. 783, s. c. 35 Am. R. 107; *American*, etc., Co. v. *Fletcher*, 25 Ind. 492; *Price v. Oswego*, etc., R. Co., 50 N. Y. 213. See, generally, *Western Union Tel. Co. v. Meyer*, 61 Ala. 158, s. c. 32 Am. R. 1; *Norwalk Bank v. Adams*, etc., Co., 4 Blatchf. 455; *Houston*, etc., R. Co. v. *Adams*, 49 Tex. 748, s. c. 30 Am. R. 116; *Sword v. Young*, 89 Tenn. 126, s.

c. 14 S. W. R. 481, 604; *Angle v. Mississippi*, etc., R. Co., 18 Iowa 555; *Claflin v. Boston R. Co.*, 7 Allen 341. As to the carriers liability for fraud of its agent, see *Jasper*, etc., Co. v. *Kansas City*, etc., R. Co., 99 Ala. 416, s. c. 14 So. R. 546.

<sup>2</sup> *Dunbar v. Boston*, etc., R. Co., 110 Mass. 26, s. c. 14 Am. R. 576; *Heugh v. London*, etc., R. Co., L. R. 5 Exch. 50; *McKean v. McIvor*, L. R. 6 Exch. 36; *Fisk v. Newton*, 1 Denio 45; *Samuel v. Cheney*, 135 Mass. 278, s. c. 46 Am. R. 467; *Edmunds v. Merchants'*, etc., Transportation, Co., 135 Mass. 283; *Wilson v. Adams*, etc., Co., 27 Mo. App. 360; *Bush v. St. Louis*, etc., R. Co., 3 Mo. App. 62. See *ante*, § 1526.

<sup>3</sup> *Ante*, § 1490.

as to the right to give instructions or directions assumes a different character. Where the shipper is both consignor and consignee, and there are no intervening rights of third persons, the shipper may change directions or instructions, and obedience to the instructions as changed will excuse a failure to deliver when the failure is attributable to the change and there is no negligence on the part of the carrier. The general rule is that where the consignor or shipper has a right to countermand the shipping directions, and does so, due obedience to such countermanding orders will relieve the carrier for a failure to deliver, except in cases where the carrier is guilty of negligence;<sup>1</sup> but it is to be borne in mind that in some instances the shipper can not rightfully countermand shipping directions and thus prevent the goods from reaching the consignee,<sup>2</sup> nor can he do so where a change will impair the rights of third persons who have acquired rights which can not be impaired by a shipper, so that the question as to the right to countermand orders is often one of controlling importance. Where the consignee, if the owner or the person entitled to control the movements of the goods, gives orders countermanding those originally given, the carrier is not in fault in obeying them,<sup>3</sup> but, as in the case of the shipper or consignor, the question hinges upon the right of the consignee to give countermanding instructions or directions. As the consignee is ordinarily regarded as the owner, the presumption is, there being no countervailing facts, that he has a right to give such orders.<sup>4</sup> It is obvious that if the failure to deliver is caused

<sup>1</sup> *Ante*, § 1431; *Scothorn v. South*, etc., R. Co., 8 Exch. 341. See *Lewis v. Galena*, etc., R. Co., 40 Ill. 281; *Michigan*, etc., R. Co. v. *Day*, 20 Ill. 375; *Straus v. Martha*, 35 Fed. R. 313.

<sup>2</sup> As the consignee, nothing to the contrary being shown, is presumptively the owner of the goods, and as third persons acting on the faith of acts done by the carrier may acquire rights which carrier can not justly impair, it necessarily follows that there

are cases in which directions can not be countermanded by the shipper or consignor. *Southern*, etc., Co. v. *Dickson*, 94 U. S. 549; *Thompson v. Fargo*, 49 N. Y. 188; *ante*, §§ 1429, 1431.

<sup>3</sup> *London*, etc., R. Co. v. *Bartlett*, 7 H. & N. 400. See *Pollard v. London*, etc., R. Co., 22 L. T. R. (N. S.) 551.

<sup>4</sup> The consignee, where there is no contract, duty, or notice to the contrary, may be treated by the carrier as

by the directions of a consignee, provided he can rightfully give such orders, the carrier is relieved from liability.

§ 1537. **Seizure under legal process—Generally.**—In discussing the subject of the exoneration of a railroad carrier in cases where the loss is attributable to the exercise of public authority we considered the question of the effect of the seizure of goods under legal process.<sup>1</sup> It is now the general rule, whatever may have been the doctrine of earlier cases, that where the goods are taken from the carrier by a writ issued from a court which appears to possess jurisdiction the failure to deliver is excused.<sup>2</sup> We do not believe that, strictly speaking, the carrier is bound at its peril to ascertain that the process is valid. Our opinion is, that if an officer armed with a writ, which appears fair on its face, and to be issued by a court having jurisdiction of the general subject, duly demands the goods, it is the duty of the carrier to yield possession.<sup>3</sup> We

the owner. *Bailey v. Hudson River, etc., R. Co.*, 49 N. Y. 70; *Fitzhugh v. Wiman*, 9 N. Y. 559; *Hotchkiss v. Artizans' Bank*, 2 Abb. App. Dec. (N. Y.) 403. The carrier may, therefore, usually act upon the orders or directions of the consignee, but can not do so in all cases; as, for instance, where there is fraud on the part of the consignee.

<sup>1</sup> *Ante*, § 1461.

<sup>2</sup> In a note to *Kohn v. Richmond, etc., R. Co.*, (37 S. Car. 1) 34 Am. St. R. 726, 735, the rule is thus stated by Mr. Freeman: "A common carrier is excused from liability for not carrying and delivering goods when, without any act, fault or connivance on his part they are seized by legal process and taken out of his possession. This proposition is universally admitted and established, no matter by or against whom the process is served, provided it is valid." *Bliven v. Hudson River, etc., R. Co.*, 36 N. Y. 403;

*Savannah, etc., R. Co. v. Wilcox*, 48 Ga. 432; *Ohio, etc., R. Co. v. Yohe*, 51 Ind. 181, s. c. 19 Am. R. 727; *McAlister v. Chicago, etc., R. Co.*, 74 Mo. 351; *Pingree v. Detroit, etc., R. Co.*, 66 Mich. 143, s. c. 11 Am. St. R. 479; *Burton v. Wilkinson*, 18 Vt. 186, s. c. 46 Am. Dec. 145; *French v. Star, etc., Co.*, 134 Mass. 288; *Furman v. Chicago, etc., R. Co.*, 57 Iowa 42, s. c. 62 Iowa 395, 68 Iowa 219; *Jewett v. Olsen*, 18 Ore. 419, s. c. 17 Am. St. R. 745; *Wells v. Maine, etc., Co.*, 4 Cliff. 228; *Lemont v. New York, etc., R. Co.*, 28 Fed. R. 920. Some of the courts seem to hold that although the carrier gives notice, it is bound to show that the officer had a legal right to seize the goods. *Gibbons v. Farwell*, 63 Mich. 344, s. c. 29 N. W. R. 855. See, generally, *Nickey v. St. Louis, etc., R. Co.*, 35 Mo. App. 79; *Edwards v. White Line Co.*, 104 Mass. 159.

<sup>3</sup> *Stiles v. Davis*, 1 Black 101, 106.

do not believe that the carrier is bound to ascertain whether there was a right to issue the writ,<sup>1</sup> nor to determine whether there is jurisdiction of the persons of the parties.<sup>2</sup> If there is no defect apparent on the face of the writ, nothing to arouse distrust, and there is jurisdiction of the general subject, then, as we believe, all questions as to the right to the writ and its validity, as well as all questions going to the regularity of the proceedings, are questions for the court and not questions which the carrier at its peril must decide. As we have said, the carrier must be free from fraud, collusion or connivance, or else it can not make the proceedings the basis of a defense.<sup>3</sup> Notice must be given promptly by the carrier, inasmuch as the failure to exercise care and diligence in that regard is a breach of duty.<sup>4</sup> It is held that where the carrier yields possession to an officer who has no writ it is not excused,<sup>5</sup> but we suppose that if the officer was actually entitled to the possession and the consignor or consignee was not, the carrier would be excused. We base our conclusion upon the rule that if the delivery is, in fact, made to the right person, the carrier is not guilty of a breach of duty.<sup>6</sup> If, however, the

<sup>1</sup>As indicated at another place, it has been held that the carrier is excused although the statute under which the writ was issued was unconstitutional. *McAlister v. Chicago, etc., R. Co.*, 74 Mo. 351. There would be, it seems to us, great difficulty in sustaining the doctrine of decision in the case cited if the statute had been adjudged unconstitutional, and it is, indeed, somewhat difficult even where there has been no such adjudication for an unconstitutional statute is absolutely void.

<sup>2</sup>We concur in the views of Mr. Freeman, who thus states the law: "The better rule would seem to be, however, that all that should be required of the carrier is to ascertain that the process is fair and valid on its face, for if it will justify the officer

in serving it, it certainly ought to justify the carrier in yielding to it." Note to *Kohn v. Richmond, etc., R. Co.*, (37 S. Car. 1) 34 Am. St. R. 726, 736. But see *Gibbons v. Farwell*, 63 Mich. 344, s. c. 6 Am. St. R. 301; *Kiff v. Old Colony, etc., R. Co.*, 117 Mass. 591, s. c. 19 Am. R. 429; *Edwards v. White Line, etc., Co.*, 104 Mass. 159, s. c. 6 Am. R. 213.

<sup>3</sup>*Ante*, § 1461.

<sup>4</sup>*Ante*, § 1461.

<sup>5</sup>*Bennett v. American, etc., Co.*, 83 Me. 236, s. c. 23 Am. St. R. 774, 13 L. R. A. 33.

<sup>6</sup>*The Idaho*, 93 U. S. 575; *Biddle v. Bond*, 6 Best & S. 225; *King v. Richards*, 6 Whart. 418, s. c. 37 Am. Dec. 420; *Sheridan v. New Quay, etc., Co.*, 4 Com. B. (N. S.) 618; *Western, etc., Co. v. Barber*, 56 N. Y. 544; *Wells v.*



carrier assumes to yield without a writ, it takes upon itself the burden of showing that the officer was the right person, and this it could not do without showing that neither the consignor nor the consignee was entitled to the goods, for it is quite clear that a surrender to an officer simply because he was an officer would not be a sufficient foundation for a defense. If the officer were a mere intruder or volunteer having no color of right or authority, or if the question of ownership was voluntarily made by the carrier, we think the conclusion required by authority is that a surrender to the officer could not be made available as a defense.<sup>1</sup> If goods are levied upon under an attachment which is subsequently dissolved it then becomes the duty of the carrier to transport them as nearly as may be according to its original undertaking.<sup>2</sup> It has been held, one of the judges dissenting, that a carrier is not bound to deliver possession to a mortgagee,<sup>3</sup> but we suppose that if the carrier could show that the mortgagee was justly entitled to possession it would be protected.<sup>4</sup>

§ 1538. **Attachment—Garnishment.**—The question whether property in the hands of a common carrier while *in transitu*

American, etc., Co., 55 Wis. 23, s. c. 42 Am. R. 695; Wolfe v. Missouri Pac. R. Co., 97 Mo. 473, 480.

<sup>1</sup>Laclouch v. Towle, 3 Esp. 114; Kieran v. Sandars, 6 Ad. & El. 515; Shelbury v. Scotsford, Yelv. 23; Wilson v. Anderton, 1 B. & Ad. 450; Gosling v. Birnie, 7 Bing. 339; Burroughes v. Bayne, 29 L. J. Exch. 185; Crouch v. Great Western, etc., R. Co., 26 L. J. Exch. 418; Wood's Browne on Carriers, 342; Hutchinson on Carriers, § 406. Attention has been called to the change in the statements in Story on Bailments by the courts and text writers, and to the fact that in the earlier editions the rule was asserted to be that delivery to the real owner would protect the carrier, while in later editions a different doctrine was stated. Sheridan v. New Quay, etc.,

Co., 4 Com. B. (N. S.) 618; Wells v. American, etc., Co., 55 Wis. 23, s. c. 42 Am. R. 695; Hutchinson on Carriers, § 404.

<sup>2</sup>Faust v. South Carolina R. Co., 8 S. Car. 118.

<sup>3</sup>Kohn v. Richmond, etc., R. Co., 37 S. Car. 1, s. c. 16 So. R. 376, 34 Am. St. R. 726, 55 Am. & Eng. R. Cas. 675.

<sup>4</sup>The conclusion asserted in the text may be supported upon the principle that delivery to the right person relieves the carrier. But, of course, the carrier assumes the burden of proving that the delivery was to the proper person. We suppose, also, that the carrier must not, on its own volition without an effective demand, deliver possession to a mortgagee. Rosenfield v. Express Co., 1 Woods (U. S.) 131.

can be attached or reached by process in garnishment has not been so much discussed in reference to railroad companies as with reference to express companies, and the rules upon the subject have not been very clearly laid down. We think, however, that the authorities warrant the conclusion that property while *in itinere* can not be attached by creditors nor reached by process in garnishment.<sup>1</sup> This is certainly so where the property is not within the jurisdiction of the court out of which the process issues.<sup>2</sup> Where the custody of the railroad company in the capacity of common carrier has terminated and the company is in possession as warehouseman and title in the principal attachment defendant has vested, then, as we believe, the goods may in the proper case be seized under a writ of attachment,<sup>3</sup> but even then there may be rights paramount to those of the attaching creditor, for the creditor can not secure greater rights as against the lien of the company or as against prior equities than the debtor had at the time the attachment lien became effective.<sup>4</sup> In cases where an attachment is issued and levied the carrier must at once give proper notice or the proceedings will not of themselves constitute a defense. As a rule an attachment can not be effective as against the consignor, since the consignee is presumptively the owner of the goods from the time of their delivery to the carrier,<sup>5</sup> but the rule that

<sup>1</sup> *Western, etc., R. Co. v. Thornton*, 60 Ga. 300; *Illinois Central R. Co. v. Cobb*, 48 Ill. 402; *Michigan, etc., R. Co. v. Chicago, etc., R. Co.*, 1 Ill. App. 399; *Bates v. Chicago, etc., R. Co.*, 60 Wis. 296, s. c. 50 Am. R. 369; 2 Shinn on Attachment, p. 967; *Louisville, etc., R. Co. v. Spalding, (Ky.)* 22 Am. & Eng. R. Cas. 418. But see *Adams v. Scott*, 104 Mass. 164.

<sup>2</sup> *Montrose, etc., Co. v. Dodson, etc., Co.*, 76 Iowa 172, s. c. 40 N. W. R. 705; *Bates v. Chicago, etc., R. Co.*, 60 Wis. 296, s. c. 19 N. W. R. 72, 50 Am. R. 369. See *Pennsylvania, etc., R. Co. v. Pennock*, 51 Pa. St. 244, 254; Shinn on Attachment, §§ 489, 490.

<sup>3</sup> *Cooley v. Minnesota, etc., R. Co.*, 53 Minn. 327, s. c. 55 N. W. R. 141, citing *Drake on Attachment*, 453; *Stiles v. Davis*, 1 Black 101.

<sup>4</sup> An attachment lien is, as a rule, subordinate to the vendor's right of stoppage *in transitu*. In *Dreyfus v. Mayer*, 69 Miss. 282, s. c. 12 So. R. 267, it was held that the vendor's right of stoppage *in transitu* extended to the money in the hands of an officer derived from the sale of property under a writ of attachment.

<sup>5</sup> *Redd v. Burrus*, 58 Ga. 574; *Bingham v. Lamping*, 26 Pa. St. 340. As to when goods may be attached, see *Peabody v. Maguire*, 79 Me. 572;

the consignee is the owner is, as we shall see hereafter, subject to important limitations and qualifications and the presumption of which we have spoken is a rebuttable one.

§ 1539. **Stoppage in transitu—General doctrine.**—Among the excuses for non-delivery of goods by a railroad carrier, is generally considered that founded upon the exercise of the right of stoppage *in transitu*, for in cases where this right is justly exercised the carrier is excused for a failure to deliver the goods entrusted to it for transportation. Under the settled rule that the consignee, nothing to the contrary appearing, is entitled to have a delivery made to him, the carrier is not excused unless the right of stoppage *in transitu* exists and is properly exercised. The right of stoppage *in transitu* is not an absolute right nor can it be made available by all who have an interest in the goods in the hands of the carrier,<sup>1</sup> nor, indeed, can it be always effectively exercised by the vendor of the goods, since the rights of third persons may intervene or other circumstances may make it unjust to permit the exercise of the right. It may be said generally that the right of stoppage *in transitu*<sup>2</sup> is a right residing in the vendor of goods to stop them while in the possession of the railroad company and before they have reached the purchaser or consignee.<sup>3</sup> The

Grant v. Shaw, 16 Mass. 341; Balderson v. Manso, 2 Cranch C. C. 623; Price v. Bradford, 4 La. 35; Dolsen v. Brown, 13 La. Ann. 551; Walker v. Detroit, etc., R. Co., 49 Mich. 446.

<sup>1</sup> Sweet v. Pym, 1 East 4; Jenkyns v. Osborne, 7 Man. & G. 678. Rights of third persons may of course intervene and defeat the vendor's right to stop *in transitu*.

<sup>2</sup> As to the persons against whom the right may be exercised, see Shepard v. Newhall, 54 Fed. R. 306; Stanton v. Eager, 16 Pick. 467; Akerman v. Humphery, 1 Car. & P. 53; Newhall v. Central, etc., R. Co., 51 Cal. 345.

<sup>3</sup> Stiles v. Howland, 32 N. Y. 309; Babcock v. Bonnell, 80 N. Y. 244; Lickbarrow v. Mason, 2 Term R. 63; Nicholls v. Le Feuvre, 2 Bing. N. C. 81; James v. Griffin, 1 M. & W. 20; Edwards v. Brewer, 2 M. & W. 375; Coates v. Railton, 6 B. & C. 422; Gibson v. Carruthers, 3 Mees. & W. 321; Oppenheim v. Russell, 3 Bos. & P. 42; Wright v. Snell, 5 Barn. & Ald. 350; Rucker v. Donovan, 13 Kan. 251; Howe v. Stewart, 40 Vt. 145; Pool v. Columbia, etc., R. Co., 23 S. Car. 286; Oppenheim v. Russell, 3 Bos. & P. 42. The right of stoppage *in transitu* is a favored one, and will avail against creditors, even though they may be

rule which permits the stoppage of goods *in transitu* is said to be founded on the principle that the property of one person who has not received payment for it shall not be taken by creditors of the vendee in satisfaction of their debts,<sup>1</sup> and as this is the foundation of the rule, it follows that insolvency of the vendee must appear in order to justify an exercise of the right.<sup>2</sup> The authorities require the conclusion that the right of stoppage *in transitu* does not exist, even though the buyer is insolvent, if that fact was known to the seller at the time the sale was made.<sup>3</sup> A valuable opinion upon the question as to what is sufficient evidence of insolvency is found in a case recently decided by the supreme court of Wisconsin, as well as upon other questions affecting the right of stoppage *in transitu*.<sup>4</sup> The question as to the duty of the carrier to act upon

lienholders. *Kingman v. Denison*, 84 Mich. 608, s. c. 11 L. R. A. 347; *Farrell v. Richmond, etc., R. Co.*, 102 N. Car. 390, s. c. 3 L. R. A. 647; *Schuster v. Carson*, 28 Neb. 612, s. c. 44 N. W. R. 734, 42 Am. & Eng. R. Cas. 360; *Estey v. Truxel*, 25 Mo. App. 238; *Durgy, Cement, etc., Co. v. O'Brien*, 123 Mass. 13; *Chicago, etc., R. Co. v. Painter*, 15 Neb. 394. As to waiver of right by owners suing out a writ, see *Woodruff v. Noyes*, 15 Conn. 335; *Allyn v. Willis*, 65 Tex. 65; *Half v. Allyn*, 60 Tex. 278. See, generally, *Thompson v. Thompson*, 4 Cush. (Mass.) 127; *Blum v. Monks*, 21 La. Ann. 268; *Blackman v. Pierce*, 23 Cal. 508; *Hause v. Judson*, 4 Dana 7, s. c. 29 Am. Dec. 377. See *Benjamin on Sales*, §§ 1229, 1231; 2 Kent Com. 628.

<sup>1</sup> *Burghall v. Howard*, 1 H. Bl. 366, n.; *Snee v. Prescott*, 1 Atk. 245.

<sup>2</sup> *Bayonne v. Umbenhauer*, (Ala.) 18 So. R. 175; *Benedict v. Schaettle*, 12 Ohio St. 515; *Allyn v. Willis*, 65 Tex. 65; *Harris v. Pratt*, 17 N. Y. 249; *Chicago, etc., Co. v. Painter*, 15 Neb. 394; *Cox v. Burns*, 1 Iowa

64; *Chandler v. Fulton*, 10 Tex. 2; *Gustine v. Phillips*, 38 Mich. 674; *Loeb v. Peters*, 63 Ala. 243; *Clark v. Lynch*, 4 Daly 83; *Conyers v. Ennis*, 2 Mason 236; *Buckley v. Furniss*, 15 Wend. 137; *Naylor v. Dennie*, 8 Pick. 198; *Reynolds v. Boston, etc., Co.*, 43 N. H. 580.

<sup>3</sup> *Fenkhausen v. Fellows*, 20 Nev. 312, s. c. 4 L. R. A. 732; *Farrell v. Richmond, etc., R. Co.*, 102 N. Car. 390, s. c. 3 L. R. A. 647; *Blum v. Marks*, 21 La. Ann. 268; *O'Brien v. Norris*, 16 Md. 122; 2 *Redfield on Railways*, 160; *Parsons Mercantile Law*, 61. It was argued in the case of *The Bird of Paradise*, 5 Wall. 545, that where a carrier undertook to transport goods, and in payment of charges accepted a time draft it could stop the goods, but the court held otherwise. Counsel based their contention upon the analogy supplied by the cases affirming the right of stoppage *in transitu*, and cited *Benedict v. Field*, 16 N. Y. 595.

<sup>4</sup> *Jeffris v. Fitchburg R. Co.*, (Wis.) 67 N. W. R. 424, 12 *National Corp. R.* 691.

the demands of the vendor and his assertion that the buyer was insolvent, has received consideration, and it has been held that the carrier is justified in acting upon the assertion and yielding to the demand.<sup>1</sup> We think it quite clear that if the assertion of insolvency is true, and the right to stoppage *in transitu* is not impaired by the intervening rights of third persons, the carrier is exonerated, but we suppose that, at all events, the carrier must exercise care and diligence in regard to the demands of the vendor, and in yielding to it assumes some risk.<sup>2</sup>

### § 1540. Who may exercise the right of stoppage in transitu.

—The right may, in the proper case, be exercised by an agent or representative of the seller, as for example, by a factor, or purchasing agent.<sup>3</sup> The rule is that the seller<sup>4</sup> can only exercise the right against his own vendee.<sup>5</sup> In the absence of a statute the general rule is that a surety of the vendee can not exercise the right.<sup>6</sup> The assignee who succeeds to the rights

<sup>1</sup> The *E. H. Pray*, 27 Fed. R. 474, citing *The Tigress*, *Browning & L.* 38.

<sup>2</sup> *The Vidette*, 34 Fed. R. 396; *Allen v. Maine*, etc., R. Co., 79 Me. 327; *Poole v. Houston*, etc., R. Co., 58 Tex. 134; *Bloomington v. Memphis*, etc., R. Co., 6 Lea 616.

<sup>3</sup> *Feise v. Wray*, 3 East 93; *Reynolds v. Boston*, etc., R. Co., 43 N. H. 580; *Chandler v. Fulton*, 10 Tex. 2, s. c. 60 Am. Dec. 188. See, as to the rights of an agent seeking to protect himself. *Gwyn v. Richmond*, etc., R. Co., 85 N. C. 429, s. c. 39 Am. R. 708, 6 Am. & Eng. R. Cas. 452; *Cassaboglou v. Gibb*, L. R. 11 Q. B. D. 797; *Phelps v. Comber*, L. R. 29 Ch. Div. 813; *Ilsley v. Stubbs*, 9 Mass. 71, s. c. 6 Am. Dec. 29; *Seymour v. Newton*, 105 Mass. 272; *Imperial Bank v. London*, etc., Co., L. R. 5 Ch. D. 195; *Newhall v. Vargas*, 13 Me. 93, 92 Am. Dec. 489. See, generally, *Kinloch v. Craig*, 3 T. R. 119.

<sup>4</sup> As to the rights of a pledgee, see

next section. See, also, *Missouri*, etc., R. Co. v. *Heidenheimer*, 82 Tex. 195, s. c. 17 S. W. R. 608, 27 Am. St. R. 861; *First National Bank v. Meyer*, 43 La. Ann. 1; *Ratzer v. Burlington*, etc., R. Co., (Minn.) 66 N. W. R. 988.

<sup>5</sup> *Memphis*, etc., R. Co. v. *Freed*, 38 Ark. 614, s. c. 9 Am. & Eng. R. Cas. 212. As to the effect of a seizure under legal process upon the right of stoppage *in transitu*, see *Schuster v. Carson*, 28 Neb. 612, s. c. 44 N. W. R. 734, 42 Am. & Eng. R. Cas. 360; *Estey v. Truxel*, 25 Mo. App. 238; *Couture v. McKay*, 6 Manitoba L. 273.

<sup>6</sup> *Freeman v. Birch*, 3 Q. B. 492, note; *Leuckhart v. Cooper*, 3 Bing. N. C. 99, S. C. 32 E. C. L. 54; *Morley v. Hay*, 3 M. & Ryland 396. But is held that where the transfer is procured by fraud the right of stoppage is not lost. *Evansville*, etc., R. Co. v. *Erwin*, 84 Ind. 457, 476. See *Ante*, §§ 1428, 1429; *St. Paul*, etc., R. Co. v. *Great Western*, etc., R. Co., 27 Fed. R. 434; *Sheppard*

of the seller of a bill of lading is held to have a right to stop goods *in transitu*.<sup>1</sup> The vendor's right may be effectively taken away by the intervention of the rights of third persons entitled to protection, as, for example, by the intervention of the rights of an assignee of the bill of lading.<sup>2</sup>

§ 1541. Against whom the right of stoppage in transitu may be exercised.—It would be foreign to the scope of our work to fully discuss the questions which arise where the rights of third persons intervene, but it seems necessary to briefly treat the general subject. Where *bona fide* purchasers acquire the goods the right is gone, but if the railroad carrier is ignorant of the acquisition of such rights, acts in good faith and exercises reasonable care and diligence it will not be liable if it yields to the right when properly asserted by the vendor. Where, however, the indorsement of bills of lading, or, doubtless, the absence of an outstanding bill of lading,<sup>3</sup> shows or indicates that the vendor's right has been assigned or has ceased to exist the carrier can not rightfully yield to the claim of the vendor. In cases where bills of lading have been so effectively indorsed as to transfer title to the assignee the vendor can not rightfully exercise the right of stoppage *in transitu*.<sup>4</sup> It is held that a *bona fide* holder of a bill of lading assigned as collateral security is invested with a title to the goods para-

*v. Newhall*, 54 Fed. R. 306. As to the difference between cases where a third person buys property and receives bill of lading and where no bill of lading is transferred, see *Pattison v. Culton*, 33 Ind. 240; distinguishing *Coxe v. Harden*, 4 East 211; *Dews v. Greene*, 32 Barb. 490; *Lee v. Kimball*, 45 Me. 172.

<sup>1</sup> *Gossler v. Schepeler*, 5 Daly (N.Y.) 476; *Morison v. Gray*, 2 Bing. 260, s. c. 9 E. C. L. 570. But see *Waring v. Cox*, 1 Camp. 369.

<sup>2</sup> *Missouri Pac. R. Co. v. Heiden-sheimer*, 82 Tex. 195, s. c. 17 S. W. R. 608. See *National Bank v. Chicago*,

etc., R. Co., 44 Minn. 224, s. c. 9 L. R. A. 263.

<sup>3</sup> *Ratzer v. Burlington, etc., R. Co.* (Minn.) 66 N. W. R. 988. Where the bill of lading is issued without authority the assignee is not protected. *National Bank, etc., v. Chicago, etc., R. Co.*, 44 Minn. 224, s. c. 46 N. W. R. 342, 560.

<sup>4</sup> *Sheppard v. Newhall*, 54 Fed. R. 306; *Stanton v. Eager*, 16 Pick. 467; *Akerman v. Humphery*, 1 Car & P. 53; *Newhall v. Central, etc., R. Co.*, 51 Cal. 345; *Missouri, etc., R. Co. v. McLiney*, 32 Mo. App. 166. See *ante*, §§ 1426, 1429.

mount to the vendor's right of stoppage *in transitu*, but that one who receives the bill of lading as collateral security for an antecedent debt is not a *bona fide* holder as against the vendor whose claim for the price of the goods is unpaid,<sup>1</sup> although he would be such a holder as against the assignor of the bill, for as between the immediate parties an antecedent debt is a valid consideration.<sup>2</sup>

§1542. Mode of exercising the right of stoppage in transitu.—Duty of carrier to give notice.—The earlier authorities inclined to the doctrine that in order to an effective exercise of the right of stoppage *in transitu* the vendor must secure possession of the goods but the rule now is that it is not necessary that the vendor should obtain actual possession. Notice is, however, essential to an effective exercise of the vendor's right.<sup>3</sup> When a demand is made upon the railroad carrier it must promptly give notice to the consignee of the vendor's assertion of the right of stoppage *in transitu*.

§ 1543. Termination of the right of stoppage in transitu.—It is obvious that where the goods have come into the hands of the consignee by actual delivery the right of stoppage *in transitu* is at an end.<sup>4</sup> This is true although the vendor may

<sup>1</sup> *Dymock v. Missouri, etc., R. Co.*, 54 Mo. App. 400; *Missouri, etc., R. Co. v. Heidenheimer*, 82 Tex. 195, s. c. 17 S. W. R. 608, 27 Am. St. R. 861; *First National Bank v. Meyer*, 43 La. Ann. 1.

<sup>2</sup> *Hewitt v. Powers*, 84 Ind. 295.

<sup>3</sup> *Allen v. Maine, etc., R. Co.*, 79 Me. 327, s. c. 30 Am. & Eng. R. Cas. 122; *Ascher v. Grand Trunk, etc., R. Co.*, 36 U. C. Q. B. 609; *Reynolds v. Boston, etc., R. Co.*, 43 N. H. 580. We suppose that, although no great formality or precision is required, the vendor's notice must be such as to fairly apprise the carrier of the vendor's purpose to regain possession of the goods. *Phelps v. Comber*, L. R. 29

Ch. Div. 813; *Clementson v. Grand Trunk, etc., R. Co.*, 42 U. C. Q. B. 263. See, generally, *Poole v. Houston, etc., R. Co.*, 58 Tex. 134, s. c. 9 Am. & Eng. R. Cas. 197; *Kemp v. Falk*, L. R. 7 App. Cas. 573; *Litt v. Cowley*, 7 Taunt. 169; *Mottram v. Heyer*, 5 Denio. 629. See, also, 23 Am. & Eng. Ency. of Law 926; *Wood's Browne on Carriers*, 350.

<sup>4</sup> In a case where goods were placed in possession of a drayman and by him taken to the store of the consignees, who declined to receive them for the reason that their store had been destroyed by fire and the goods were returned to the company it was held that the transit was at an

lawfully exercise the right of recaption since the right of recaption is not the same thing as the right of stoppage *in transitu*.<sup>1</sup> It will be found upon an examination of the adjudged cases that the dispute has fallen upon the question as to what is a sufficient delivery to defeat the right of stoppage *in transitu* for there is no controversy as to the effect of a sufficient delivery nor has there been from the earliest years of the common law, since it has been steadily held that a sufficient delivery to the consignee defeats the right.<sup>2</sup> It may be said generally that the test as to the sufficiency of a delivery to a consignee is not the same where the question is solely between the railroad company and the consignee or owner as the test where the question arises in cases between vendor and purchaser and involves the right to stop the goods *in transitu*, for a delivery may be sufficient to relieve from liability as a carrier and yet not sufficient to defeat the right of stoppage *in transitu*.<sup>3</sup> The carrier is not, it is manifest, greatly concerned with the question as to the sufficiency of the delivery to defeat the right of stoppage *in transitu* in cases where the delivery is such as terminates its liability but it is concerned with the question as to when its duty to yield to the vendor's right to stop *in transitu* has ended in cases where it has possession of the goods. If the goods have reached the place to which they were shipped

end so far as concerned the right of stoppage *in transitu*. *O'Neal v. Day*, 53 Mo. App. 139; *Shoninger v. Day*, 53 Mo. App. 147. See *Mollison v. Lockhart*, 30 N. Brunswick 398.

<sup>1</sup>In cases where the owner may lawfully retake goods under the right of recaption and he properly exercises such right and retakes the goods there can not be any liability on the part of the carrier to the consignee, but while this is true, it is also true that while there is a close resemblance between the right of recaption and the right of stoppage *in transitu* there are well-marked differences.

<sup>2</sup>*Lickbarrow v. Mason*, 2 Term R. 63; *Foster v. Frampton*, 6 B. & C.

107; *Dixon v. Yates*, 5 B. & Ad. 313; *Tanner v. Scovell*, 14 M. & W. 28; *Sheppard v. Newhall*, 54 Fed. R. 306; *Wallace v. The Natchez*, 31 Fed. R. 615; *Langstaff v. Stix*, 64 Miss. 171, s. c. 1 So. R. 97; *Greve v. Dunham*, 60 Iowa 108, s. c. 14 N. W. R. 130; *Hall v. Dimond*, 63 N. H. 565, s. c. 3 Atl. R. 423; *Symns v. Schotten*, 35 Kan. 310, s. c. 10 Pac. R. 828; *More v. Lott*, 13 Nev. 376; *Macon, etc., R. Co. v. Meador*, 65 Ga. 705; *Klein v. Fischer*, 30 Mo. App. 568; *United States, etc., Co. v. Oliver*, 16 Neb. 612, s. c. 21 N. W. R. 463. See *Benjamin on Sales*, §§ 839, 844.

<sup>3</sup>*Harris v. Tenney*, 85 Tex. 254, s. c. 34 Am. St. R. 796.



and the railroad company there accepts them as the agent of the consignee and undertakes to hold possession of them as his agent and so holds possession the right of stoppage *in transitu* is at an end,<sup>1</sup> but the right does not terminate when the goods arrive at the place to which they were shipped unless they go into the hands of the company as the agent of the consignee, insomuch as there must be a change in the capacity in which the company holds the goods for if it continues to hold them in its capacity as carrier or holds them as a warehouseman the right of the vendor is not at an end. The fact that the goods go into the possession of the company in its capacity of a warehouseman does not defeat the vendor's right, unless they are taken possession of, as just indicated, by the company in the capacity of agent for the consignee. As long as the goods are in transit or in the hands of a warehouseman or other person as incidental to or connected with their transportation the right of stoppage *in transitu* exists.<sup>2</sup> It may, indeed, be safely said that the general rule is that as long as the company in any capacity except as agent of the consignee has control of the goods whether in the capacity of carrier or warehouseman the vendor's right is not terminated, for as long as anything remains to be done in order to complete a delivery to the consignee that long the right of stoppage *in transitu* endures.<sup>3</sup> The

<sup>1</sup> Wentworth v. Outhwaite, 10 M. & W. 436; Wood's Browne on Carriers, 352. See, also, Whitehead v. Anderson, 9 Mees. & W. 518; Williams v. Hodges, 113 N. Car. 36, s. c. 18 S. E. R. 83, citing 1 Parsons on Cont. 603; 2 Benjamin on Sales, § 1117; 2 Addison on Confs., § 600.

<sup>2</sup> Jenks v. Fulmer, 160 Pa. St. 527, s. c. 28 Atl. R. 841; Lewis v. Sharvey, 58 Minn. 464, s. c. 59 N. W. R. 1096; Carbeen v. Campbell, 30 Pa. St. 254; Harris v. Tenney, 85 Tex. 254, s. c. 20 S. W. R. 82; Inslee v. Lane, 57 N. H. 454; White v. Mitchell, 38 Mich. 390; Scott v. William B. Grimes, etc., Co., 48 Mo. App. 521; McFetridge v. Piper, 40 Iowa 627; Calahan v. Babcock,

21 Ohio St. 281; Buckley v. Furniss, 15 Wend. 137; Bartram v. Farebrother, 4 Bing. 579; Harris v. Pratt, 17 N. Y. 249; Weber v. Baessler, 3 Colo. App. 459, s. c. 34 Pac. R. 261. See, generally, Langstaff v. Stix, 64 Miss. 171, s. c. 60 Am. R. 49, 57; Rucker v. Donovan, 13 Kan. 251, s. c. 19 Am. R. 84, 92; Sawyer v. Joslin, 20 Vt. 172, s. c. 49 Am. Dec. 768.

<sup>3</sup> Rogers v. Schneider, 13 Ind. App. 23, s. c. 41 N. E. R. 71; Bethell v. Clark, L. R. 20 Q. B. D. 615; Lyons v. Hoffnung, L. R. 15 App. Cas. 391; Bolton v. Lancashire, etc., R. Co., 1 L. R. C. P. 431; Scott v. William B. Grimes, etc., Co., 48 Mo. App. 521. A carrier may, by contract,

effect of a partial delivery received consideration in a late case and it was held that delivery of part of the goods will not defeat the right of stoppage *in transitu*, "as a delivery of part will not be a delivery of the whole unless the circumstances show that it was intended so to operate."<sup>1</sup>

§ 1544. **Adverse claimants—Procedure on part of carrier—Interpleader.**—In cases where claims are made to goods in the hands of a railroad carrier by persons not known in the contract of carriage proper notice should be promptly given.<sup>2</sup> It is, however, not safe to rely on notice alone in cases where legal proceedings have not been taken, for where the carrier assumes to decide between rival claimants it may incur a liability, since if it yields possession it takes the risk of correctly determining which of the rival claimants is entitled to the property. It has been held that a bill of interpleader filed by a carrier in a case where goods were in controversy is not sufficient where it shows that the attachment was not levied,<sup>3</sup> but

waive its lien for freight and make a complete delivery, without treating the freight as paid. *Kemp v. Falk*, 7 App. Cas. 573; *Jeffris v. Fitchburg R. Co.*, (Wis.) 67 N. W. R. 424. There is no presumption that the lien was waived and a complete delivery made. *Jeffris v. Fitchburg R. Co.*, (Wis.) 67 N. W. R. 424, citing *Ex parte*, *Cooper*, L. R. 11 Ch. Div. 68; *Buckley v. Fenness*, 17 Wend. 504; *Crawshay v. Eades*, 1 Barn. & C. 181; *Calahan v. Babcock*, 21 Ohio St. 281; *Symns v. Schotten*, 35 Kan. 310, s. c. 10 Pac. R. 828.

<sup>1</sup> *Jeffries v. Fitchburg R. Co.*, (Wis.) 67 N. W. R. 427, 12 National Corp. R. 691.

<sup>2</sup> *The M. M. Chase*, 37 Fed. R. 708. See, generally, *Robinson v. Memphis, etc., R. Co.*, 16 Fed. R. 57; *MacVeagh v. Atchison, etc., R. Co.*, 3 N. Mex. 205, s. c. 5 Pac. R. 457, 18 Am. & Eng. R. Cas. 651; *Livingston v. Miller*, 48 Hun. 232, s. c. 16 N. Y. S. R. 71; *Sa-*

*vannah, etc., R. Co. v. Wilcox*, 48 Ga. 432.

<sup>3</sup> *Crass v. Memphis, etc., R. Co.*, 96 Ala. 447, s. c. 11 So. R. 480. It was also held that where the carrier's lien for freight is not assented to by the parties a bill of interpleader will not lie as against a party asserting his right of stoppage *in transitu*. See *Cleveland, etc., R. Co. v. Moline Plow Co.*, 13 Ind. App. 225, where it is held that one who forcibly takes goods from the depot platform may be brought into a case brought against the company by the owner of the goods. We deferentially suggest that the court erred in holding that, under the code, a cross-complaint was necessary, inasmuch as where the parties are all before the court upon pleadings answered or replied to, complete relief will be awarded. *Humphrey v. Thorn*, 63 Ind. 296; *Shattuck v. Cox*, 97 Ind. 242.

we think that where hostile claims are clearly shown and it is made to appear that there is an actual controversy a bill of interpleader is sufficient. The safe course is for the carrier to file a complaint in the nature of a bill of interpleader and secure a judgment determining the rights of the contesting parties.<sup>1</sup> This course may certainly be pursued in the code states, and there is, as we conceive, no valid reason why substantially the same course may not be pursued in other states.<sup>2</sup>

<sup>1</sup>For decisions under the English Co., 45 Neb. 487, s. c. 63 N. W. R. 859, statute see *Scott v. Lewis*, 2 Cromp. 12 Am. R. & Corp. R. (Lewis) 27; *M. & R.* 289; *Allen v. Gilby*, 3 Dowl. Hutchinson on Carriers, § 407. But *P. C.* 143. see *McGaw v. Adams*, 14 How. Pr.

<sup>2</sup>*Shellenberg v. Fremont, etc.*, R. 461, a case of doubtful soundness.

## CHAPTER LXIV.

### CARRIERS OF LIVE STOCK.

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|------------------------------------------------------------------------|-------------------------------------------------|
| § 1545. Railroad companies are common carriers of live stock.          | § 1551. Cars and appliances—Terminal charges.   |
| 1546. No liability for injuries arising from inherent nature of stock. | 1552. Loading and unloading.                    |
| 1547. Duty to receive and carry.                                       | 1553. Duty to feed, water and care for stock.   |
| 1548. Liability for negligence—Burden of proof.                        | 1554. Statutory regulations.                    |
| 1549. Rule where owner accompanies the stock.                          | 1555. Liability for delay.                      |
| 1550. Contributory negligence of owner.                                | 1556. Liability for loss or failure to deliver. |
|                                                                        | 1557. Limiting liability.                       |

§ 1545. Railroad companies are common carriers of live stock.—The earlier English reports and some of the decisions in this country contain many conflicting opinions upon the subject of the liability of railroad companies as carriers of live stock.<sup>1</sup> But it is now well settled in most jurisdictions that carriers of live stock are, in a sense at least, common carriers. The rule, as now established by the great weight of modern authority, is that railroad companies are common carriers of live stock, with substantially the same duties and responsibilities that existed at common law with respect to the carriage of goods, except that they are not liable as insurers against loss and injury resulting from the inherent nature, propensities or “proper vice” of the animals themselves.<sup>2</sup> In Michigan, how-

<sup>1</sup> See *McManus v. Lancashire, etc., R. Co. v. McDonough*, 21 Mich. 165; *R. Co., 2 H. & N. 693*, s. c. 27 L. J. Nashville, etc., *R. Co. v. Jackson*, 6 Exch. 201, 4 H. & N. 328; *Palmer v. Heisk. (Tenn.) 271*; *Baker v. Louisville, etc., R. Co., 10 Lea (Tenn.) 749*; *Pardington v. South Wales R. Co., 1 H. & N. 392, 396*, s. c. 38 Eng. 9 Bush. (Ky.) 645.

<sup>2</sup> *Louisville, etc., R. Co. v. Wynn*, 88

ever, it was held many years ago in a strongly reasoned opinion that a railroad company is not a common carrier of live stock, and that decision has been steadily adhered to, notwithstanding the weight of modern authority to the contrary.<sup>1</sup>

§ 1546. **No liability for injuries arising from inherent nature of stock.**—It is not, perhaps, strictly correct to say that the rule that the carrier is not liable for injuries resulting from the inherent nature or propensities of the stock is an exception to the common law rule governing the liability of common carriers, for this was the rule at common law respecting other kinds of property, as well as with respect to live stock and was frequently applied to shipments of fruit and other perishable articles.<sup>2</sup> But whether it should be treated as

Tenn. 320, s. c. 14 S. W. R. 311, 3 Lewis' Am. R. & Corp. R. 13; Hart v. Pennsylvania R. Co., 112 U. S. 331, s. c. 5 Sup. Ct. R. 151; South, etc., Alabama, etc., R. Co. v. Henlein, 52 Ala. 606; Central R., etc., Co. v. Smitha, 85 Ala. 47, s. c. 4 So. R. 708; Agnew v. Steamer Contra Costa, 27 Cal. 425; Union Pac. R. Co. v. Rainey, 19 Colo. 225, 61 Am. & Eng. R. 302; East Tenn., etc., R. Co. v. Whittle, 27 Ga. 535; Georgia, etc., R. Co. v. Beatie, 66 Ga. 438, s. c. 42 Am. R. 75; St. Louis, etc., R. Co. v. Dorman, 72 Ill. 504; Kansas City, etc., R. Co. v. Simpson, 30 Kan. 645, s. c. 2 Pac. R. 821; Peters v. New Orleans, etc., R. Co., 16 La. Ann. 222; Sager v. Portsmouth, etc., R. Co., 31 Me. 228; Philadelphia, etc., R. Co. v. Lehman, 56 Md. 209; Smith v. New Haven, etc., R. Co., 12 Allen (Mass.) 531; Evans v. Fitchburg, etc., R. Co., 111 Mass. 142; Moulton v. St. Paul, etc., R. Co., 31 Minn. 85, s. c. 16 N. W. R. 497; Lindsley v. Chicago, etc., R. Co., 36 Minn., 539, s. c. 33 N. W. R. 7; Chicago, etc., R. Co. v. Abels, 60 Miss. 1017; McFadden v. Missouri, etc., R. Co., 92 Mo. 343, s. c. 4 S. W. R. 689; Atchison, etc., R. Co. v. Washburn, 5 Neb. 117; McCoy v. Keokuk, etc., R. Co., 44 Iowa 424; Myrard v. Syracuse, etc., R. Co., 71 N. Y. 180; Clarke v. Rochester, etc., R. Co., 14 N. Y. 570; Lee v. Raleigh R. Co., 72 N. Car. 236; Welsh v. Pittsburg, etc., R. Co., 10 Ohio St. 65; Bamberg v. South Carolina R. Co., 9 S. Car. 61; Powell v. Pennsylvania R. Co., 32 Pa. St. 414; Kimball v. Rutland, etc., R. Co., 26 Vt. 247; Virginia, etc., R. Co. v. Sayers, 26 Gratt. (Va.) 328; Maslin v. Baltimore, etc., R. Co., 14 W. Va. 180; Ayres v. Chicago, etc., R. Co., 71 Wis. 372, s. c. 37 N. W. R. 432. See, also, Kendall v. London, etc., R. Co., L. R. 7 Exch. 373; Palmer v. Grand Junction R. Co., 4 M. & W. 749; Blower v. Great Western R. Co., L. R. 7 C. P. 655; Mofatt v. Great Western R. Co., 15 L. T. 630, 19 Cent. L. Jour. 161.

<sup>1</sup> Heller v. Chicago, etc., R. Co., (Mich.) 66 N. W. R. 667; Michigan, etc., R. Co. v. McDonough, 21 Mich. 165; Lake Shore, etc., R. Co. v. Perkins, 25 Mich. 329.

<sup>2</sup> Moulton v. St. Paul, etc., R. Co., 31 Minn. 85, s. c. 47 Am. R. 781; Bamberg v. South Carolina R. Co., 9

an exception to the general rule or not, it is well settled that, although insurers in other respects to the same extent as at common law in the carriage of goods, railroad companies are not liable as insurers for losses and injuries caused to live stock by the inherent nature and propensities of the animals.<sup>1</sup> Thus, it has been held that the carrier is not liable for the death of a bullock, which, after it has been properly fastened in the car, by its own exertions releases itself and is killed without any negligence on the part of the carrier;<sup>2</sup> nor for the overheating of an animal caused by its own propensities, lack of vitality or exertion;<sup>3</sup> nor for injuries to one animal inflicted by another where the carrier is free from fault.<sup>4</sup> But, as we shall hereafter show, the carrier is liable for loss or injury caused by its own negligence, although, but for the nature or propensities of the animals no loss or injury would have resulted.<sup>5</sup>

S. Car. 61; Louisville, etc., R. Co. v. Bigger, 66 Miss. 319; Illinois Cent. R. Co. v. Brelsford, 13 Ill. App. 251; ante, § 1481.

<sup>1</sup> Nugent v. Smith, L. R. 1 C. P. Div. 423, s. c. 45 L. J. C. P. 697; Penn v. Buffalo, etc., R. Co., 49 N. Y. 204, s. c. 10 Am. R. 355; Cragin v. New York, etc., R. Co., 51 N. Y. 61, s. c. 10 Am. R. 559; Wabash, etc., R. Co. v. McCasland, 11 Ill. App. 491; Illinois Cent. R. Co. v. Scruggs, 69 Miss. 418, s. c. 13 So. R. 698; Boehl v. Chicago, etc., R. Co., 44 Minn. 191, s. c. 46 N. W. R. 333; Black v. Chicago, etc., R. Co., 30 Neb. 197; Louisville, etc., R. Co. v. Bigger, 66 Miss. 319, s. c. 6 So. R. 234; St. Louis, etc., R. Co. v. Lesser, 46 Ark. 236; St. Louis, etc., R. Co. v. Clark, 48 Kans. 321; Texas, etc., R. Co. v. Stribling, (Tex. Civ. App.) 34 S. W. R. 1002; Missouri Pac. R. Co. v. Fagan, (Tex. Civ. App.) 27 S. W. R. 887; Coupland v. Housatonic R. Co., 61 Conn. 531, s. c. 23 Atl. R. 870. Most of the authorities cited in the preceding note recognize this exception.

<sup>2</sup> Blower v. Great Western R. Co., L. R. 7 C. P. 655. See, also, Hall v. Renfro, 3 Metc. (Ky.) 51; Indianapolis, etc., R. Co. v. Jurey, 8 Ill. App. 160.

<sup>3</sup> Chicago, etc., R. Co. v. Owen, 21 Ill. App. 339; Maslin v. Baltimore, etc., R. Co., 14 W. Va. 180; Chicago, etc., R. Co. v. Harmon, 12 Ill. App. 54. See, also, Kirby v. Great Western R. Co., 18 L. T. N. S. 658.

<sup>4</sup> Evans v. Fitchburg R. Co., 111 Mass. 142, s. c. 15 Am. R. 19; Louisville, etc., R. Co. v. Bigger, 66 Miss. 319, s. c. 6 So. R. 234; Gabay v. Lloyd, 3 B. & C. 793; Conger v. Hudson River R. Co., 6 Duer (N. Y.) 375; Lawrence v. Aberdein, 5 B. & Ald. 107.

<sup>5</sup> Post, § 1548. See, also, Illinois Cent. R. Co. v. Adams, 42 Ill. 474; Ritz v. Pennsylvania R. Co., 3 Phila. (Pa.) 82; Powell v. Pennsylvania R. Co., 32 Pa. St. 414; Indianapolis, etc., R. Co. v. Allen, 31 Ind. 394; Shaw v. Great Southern, etc., R. Co., 8 L. R. Ir. 10; Root v. New York, etc., R. Co., 83 Hun 111, s. c. 31 N. Y. Supp.

§ 1547. **Duty to receive and carry.**—As railroad companies which carry live stock for hire are common carriers, it follows that they are bound to receive and carry such stock on reasonable terms for all who properly offer it for transportation, and are liable for refusal to carry without a good excuse.<sup>1</sup> It has been held that neither the fact that the stock was delivered to it by a connecting carrier on Sunday,<sup>2</sup> nor the fact that it consisted of Texas cattle, the transportation of which was forbidden by an unconstitutional statute, is a good excuse.<sup>3</sup> But it has been held, on the other hand, that a railway company is not liable in damages by reason of its refusal to receive cattle for transportation into a county in which a license is lawfully required as a prerequisite thereto and the owner of the cattle has failed to procure such license;<sup>4</sup> and we suppose it would be justified in refusing to receive and carry diseased cattle likely to injure others, or cattle which it is prohibited from carrying by a constitutional and valid statute.<sup>5</sup> So, a railroad company would doubtless be justified in refusing or failing to carry live stock under circumstances similar to those which would justify it in refusing to receive and carry other kinds of freight.<sup>6</sup>

§ 1548. **Liability for negligence—Burden of proof.**—The carrier is, of course, liable for injuries caused to the live stock

357; *Alabama, etc., R. Co. v. Sparks*, 71 Miss. 757, s. c. 16 So. R. 263; *Crow v. Chicago, etc., R. Co.*, 57 Mo. App. 135.

<sup>1</sup>*Ballentine v. North Missouri R. Co.*, 40 Mo. 491; *Chicago, etc., R. Co. v. Erickson*, 91 Ill. 613; *Texas, etc., R. Co. v. Nicholson*, 61 Tex. 491; *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, s. c. 9 S. W. R. 749, 2 L. R. A. 75; *South Alabama, etc., R. Co. v. Henlein*, 52 Ala. 606. See, also, *ante*, §§ 1454, 1465, 1468-1471.

<sup>2</sup>*Philadelphia, etc., R. Co. v. Lehman*, 56 Md. 209; *Guinn v. Wabash, etc., R. Co.*, 20 Mo. App. 453.

<sup>3</sup>*Chicago, etc., R. Co. v. Erickson*, 91 Ill. 613.

<sup>4</sup>*Williams v. Great Western R. Co.*, 52 L. T. R. 250, s. c. 49 J. P. 439.

<sup>5</sup>See as to constitutionality of such statutes and liability of the carrier under them, *Railroad Co. v. Husen*, 95 U. S. 465; *Furley v. Chicago, etc., R. Co.*, 90 Iowa 146, 57 N. W. R. 719; *Missouri Pac. R. Co. v. Finley*, 38 Kan. 550, s. c. 16 Pac. R. 951; *Wilson v. Kansas City, etc., R. Co.*, 60 Mo. 184; *Coyle v. Chicago, etc., R. Co.*, 27 Mo. App. 584; *Receivers of International, etc., R. Co. v. Wright*, 2 Tex. Civ. App. 198, s. c. 21 S. W. R. 56; *Grimes v. Eddy*, 126 Mo. 168, 61 Am. & Eng. R. Cas. 343, and note.

<sup>6</sup>See *ante*, §§ 1466, 1474.

by its own negligence,<sup>1</sup> and this is true although the animals, owing to their natural propensities, may have contributed thereto,<sup>2</sup> provided their owner, or his agent, was not guilty of contributory negligence. Thus, where animals, by being overcrowded, become heated and die by reason of the failure of the carrier to water and cool them, it is liable therefor, and the fact that its pump is out of order is no excuse.<sup>3</sup> So, where the train is delayed by a snowstorm and the carrier negligently permits them to die of cold.<sup>4</sup> So, where the carrier negligently furnishes an infected car,<sup>5</sup> or negligently sets the bedding on fire and thus injures the stock.<sup>6</sup> But the fact that a railroad company did not provide any bedding for the stock has been held not to be of itself *prima facie* evidence of negligence on its part.<sup>7</sup> Although animals are injured by becoming restive, if the restiveness was caused by the negligence of the carrier it will be liable, and the carrier has been held lia-

<sup>1</sup> Indianapolis, etc., R. Co. v. Allen, 31 Ind. 394; Moulton v. St. Paul, etc., R. Co., 31 Minn. 85, s. c. 47 Am. R. 781; Oxley v. St. Louis, etc., R. Co., 65 Mo. 629; Virginia, etc., R. Co. v. Sayers, 26 Gratt. (Va.) 328; South, etc., R. Co. v. Henlein, 52 Ala. 606, s. c. 23 Am. R. 578; German v. Chicago, etc., R. Co., 38 Iowa 127; Gulf, etc., R. Co. v. Ellison, 70 Tex. 491, s. c. 7 S. W. R. 785; East Tenn., etc., R. Co. v. Johnston, 75 Ala. 596, s. c. 51 Am. R. 489, 22 Am. & Eng. R. Cas. 437; Cooke v. Kansas City, etc., R. Co., 57 Mo. App. 471; Abrams v. Milwaukee, etc., R. Co., 87 Wis. 485, s. c. 58 N. W. R. 780; Louisville, etc., R. Co. v. Grant, 99 Ala. 325, s. c. 13 So. R. 599; Atchison, etc., R. Co. v. Ditmars, (Kan.) 43 Pac. R. 833; Norfolk, etc., R. Co. v. Sutherland, 89 Va. 703; Leonard v. Fitchburg R. Co., 143 Mass. 307.

<sup>2</sup> Kinnick v. Chicago, etc., R. Co., 69 Iowa 665, s. c. 27 Am. & Eng. R. Cas. 55; Betts v. Chicago, etc., R. Co., (Iowa) 60 N. W. R. 623; Galves-

ton, etc., R. Co. v. Herring, (Tex. Civ. App.) 36 S. W. R. 129; Wiloughby v. Horridge, 12 Com. B. 742, s. c. 22 L. J. C. P. 90; New York, etc., R. Co. v. Estill, 147 U. S. 591, s. c. 13 Sup. Ct. R. 444; Giblin v. National, etc., Co., 28 N. Y. Supp. 69; Haynes v. Wabash, etc., Co., 54 Mo. App. 582; Sturgeon v. St. Louis, etc., R. Co., 65 Mo. 569, and authorities cited in following notes.

<sup>3</sup> Illinois, etc., R. Co. v. Adams, 42 Ill. 474; Toledo, etc., R. Co. v. Thompson, 71 Ill. 434.

<sup>4</sup> Feinberg v. Delaware, etc., R. Co., 52 N. J. L. 451, s. c. 20 Atl. R. 33.

<sup>5</sup> Railway Co. v. Henderson, 57 Ark. 402. See, also, Shaw v. Great Southern R. Co., 8 L. R. Ir. 10; Tattersall v. National, etc., Co., L. R. 12 Q. B. Div. 297.

<sup>6</sup> Powell v. Pennsylvania R. Co., 32 Pa. St. 414. See, also, Holsapple v. Rome, etc., R. Co., 86 N. Y. 275.

<sup>7</sup> East Tenn., etc., R. Co. v. Johnston, 75 Ala. 596, s. c. 51 Am. R. 489, 22 Am. & Eng. R. Cas. 437.



ble in such a case, notwithstanding a stipulation in the contract for transportation that the carrier should not be liable for any accident occasioned by the restiveness of the animals.<sup>1</sup> So carriers have been held liable in many cases for injuries caused by defective cars, stock-pens and the like,<sup>2</sup> and it has been held that where stock are suffering or become frightened or unruly, it is the duty of the company, when properly requested, to sidetrack the car where it can reasonably do so.<sup>3</sup> There is some conflict among the authorities as to the burden of proof in such cases; but the prevailing rule, where the owner or his agent does not go with the stock, is that when the animals are shown to have been delivered to the carrier in good condition, and to have been lost or injured on the way, the burden of proof then rests upon the carrier to show that the loss or injury was not caused by its own negligence.<sup>4</sup> There is much, however, that might be said in favor of the opposite rule, for, although the facts may sometimes be peculiarly within the knowledge of the carrier, yet, as it is well known that animals are peculiarly liable to injure themselves and each other, we

<sup>1</sup> *Moore v. Great Northern, etc., R. Co.*, L. R. 10 Ir. 95; *Gill v. Manchester, etc., R. Co.*, L. R. 8 Q. B. 186, s. c. 42 L. J. Q. B. 89.

<sup>2</sup> *Smith v. New Haven, etc., R. Co.*, 12 Allen (Mass.) 531; *Great Western R. Co. v. Hawkins*, 18 Mich. 427; *St. Louis, etc., R. Co. v. Dorman*, 72 Ill. 504; *Indianapolis, etc., R. Co. v. Strain*, 81 Ill. 504; *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, s. c. 15 S. W. R. 568; *Mason v. Missouri Pac. R. Co.*, 25 Mo. App. 473; *Wilson v. Hamilton*, 4 Ohio St. 722.

<sup>3</sup> *Coupland v. Housatonic R. Co.*, 61 Conn. 531, s. c. 23 Atl. R. 870; *Johnson v. Alabama, etc., R. Co.*, 69 Miss. 191, s. c. 11 So. R. 104. But compare *Illinois Cent. R. Co. v. Peterson*, 68 Miss. 454, s. c. 10 So. R. 43, 49 Am. & Eng. R. Cas. 171. See, also, *Bills v. New York, etc., R. Co.*, 84 N. Y. 5;

*Squire v. New York, etc., R. Co.*, 98 Mass. 239, s. c. 93 Am. Dec. 162.

<sup>4</sup> *Louisville, etc., R. Co. v. Wynn*, 88 Tenn. 320, s. c. 14 S. W. R. 311, 3 Lewis' Am. R. & Corp. R. 13; *Missouri Pac. R. Co. v. Texas, etc., R. Co.*, 41 Fed. R. 913; *Boehl v. Chicago, etc., R. Co.*, 44 Minn. 191, s. c. 46 N. W. R. 333; *Lindsley v. Chicago, etc., R. Co.*, 36 Minn. 539, s. c. 33 N. W. R. 7; *Doan v. St. Louis, etc., R. Co.*, 38 Mo. App. 408; *Western R. Co. v. Harwell*, 91 Ala. 340, s. c. 8 So. R. 649; *Ft. Worth, etc., R. Co. v. Great-house*, 82 Tex. 104, s. c. 17 S. W. R. 834, 49 Am. & Eng. R. Cas. 157; *Dow v. Portland, etc., Co.*, 84 Me. 490, s. c. 24 Atl. R. 945; *Chicago, etc., R. Co. v. Abels*, 60 Miss. 1017; *Wallingford v. Columbia, etc., R. Co.*, 26 S. Car. 258; *McCoy v. Keokuk, etc., R. Co.*, 44 Iowa 424; *Chapin v. Chicago, etc., R. Co.*, 79 Iowa 582.

think it is going very far to cast the burden upon the company to show that they were not injured by its own negligence where the plaintiff introduces no evidence to show how the injuries were inflicted or that any accident occurred to the train, or the like, and there is nothing to show that the injuries might not have been caused solely because of the inherent nature and propensities of the animals themselves. This view is not entirely without the support of authority.<sup>1</sup>

§ 1549. **Rule where owner accompanies the stock.**—The fact that the owner, or his agent, is furnished transportation by the carrier and goes with his cattle or horses to look after and care for them, especially if he has agreed to do so in the contract of carriage, often exerts an important influence in determining the duties and liabilities of the carrier in the particular case. As we shall hereafter show it may relieve the carrier from the duty to feed and water and otherwise give particular attention to the stock;<sup>2</sup> but it will not relieve the carrier from the duty to afford the owner reasonable opportunities for so doing. The fact that the owner accompanies the stock and takes charge of it may also be important upon the question of contributory negligence. So, where the owner accompanies the stock, under a special contract to care for them himself, he may well be presumed to be as well acquainted with the facts

<sup>1</sup> *Pennsylvania R. Co. v. Raiordon*, 119 Pa. St. 577, s. c. 13 Atl. R. 324; *International, etc., R. Co. v. Smith*, 1 Tex. App. (Civil Cases) 484; *Smith v. Midland R. Co.*, 57 L. T. R. 813; *Hussey v. The Saragossa*, 3 Woods (U. S. C. C.) 380; *Harris v. Midland R. Co.*, 25 W. R. 63; *Kendall v. London, etc., R. Co.*, L. R. 7 Exch. 373. See, also, *ante*, § 1516, note 1, on page 2347; *St. Louis, etc., R. v. Piper*, 13 Kan. 505; *Bankard v. Baltimore, etc., R. Co.*, 34 Md. 197.

<sup>2</sup> "Of course, the carrier is relieved from special care and oversight of the animals, where the owner or his agent accompanies them for that purpose."

*Boehl v. Chicago, etc., R. Co.*, 44 Minn. 191, s. c. 46 N. W. R. 333, 334, citing *Ang. Carr.*, § 214, *et seq.*; *Hutch. Carr.* § 217; *Clarke v. Rochester, etc., R. Co.*, 14 N. Y. 570, 67 Am. Dec. 205; *Evans v. Fitchburg R. Co.*, 111 Mass. 142; 3 Am. & Eng. Ency. of Law 6; *Moulton v. Railroad Co.*, 31 Minn. 85, s. c. 16 N. W. R. 497; 2 Wait Act. & Def., 32. This statement is, perhaps, a little too sweeping, as the mere fact that the shipper accompanied the stock will not necessarily relieve the shipper from liability for failing to feed and water, or the like, unless there is a special contract to that effect.

in regard to their loss or injury as the carrier, and as they may have been injured because of his own negligence, or because of their inherent nature and propensities, and not by the negligence of the carrier, it is but just to require him to show the facts. The rule in such cases, therefore, is that the burden of proof is upon the plaintiff to show that a breach of duty upon the part of the carrier caused the injury or loss, and if the carrier is liable only for negligence the burden is upon the plaintiff to show such negligence.<sup>1</sup> It has also been held that a railroad company is not liable as an insurer where the car in which animals are shipped is in the possession and control of their owner under a contract that he should take care of them, and that if they are injured by the act of the owner the carrier is not liable no matter whether such act was negligent or not.<sup>2</sup> The court further held, in the case just referred to, that even if the special contract was prohibited by statute, and therefore invalid, there could be no recovery.<sup>3</sup>

§ 1550. **Contributory negligence of owner.**—The contributory negligence of the owner of the stock will defeat a recovery by him.<sup>4</sup> Thus, where there was evidence tending to show that he had attached the halter to a horse in such a manner as to cause restiveness and bad temper and had failed to take off

<sup>1</sup> *Terre Haute, etc., R. Co. v. Sherwood*, 132 Ind. 129, s. c. 31 N. E. R. 781, 55 Am. & Eng. R. Cas. 326, 17 L. R. A. 339; *Clark v. St. Louis, etc., R. Co.*, 64 Mo. 440; *McBeath v. Wabash, etc., R. Co.*, 20 Mo. App. 445; *St. Louis, etc., R. Co. v. Weakly*, 50 Ark. 397, s. c. 7 Am. St. R. 104, 117, 8 S. W. R. 134; *Louisville, etc., R. Co. v. Hedger*, 9 Bush (Ky.) 645; *Boehl v. Chicago, etc., R. Co.*, 44 Minn. 191, s. c. 46 N. W. R. 333.

<sup>2</sup> *Hart v. Chicago, etc., R. Co.*, 69 Iowa 485, s. c. 29 N. W. R. 597. But compare *McDaniel v. Chicago, etc., R. Co.*, 24 Iowa 412; *Peters v. New Orleans, etc., R. Co.*, 16 La. Ann. 222;

*Moulton v. St. Paul, etc., R. Co.*, 31 Minn. 85, s. c. 47 Am. R. 781.

<sup>3</sup> See, also, *Roderick v. Railroad Co.*, 7 W. Va. 54.

<sup>4</sup> *Pratt v. Ogdensburg, etc., R. Co.*, 102 Mass. 557; *Illinois, etc., R. Co. v. Brelsford*, 13 Ill. App. 251; *White v. Winnisimmit Co.*, 7 Cush. (Mass.) 155; *Dudley v. Camden, etc., Co.*, 42 N. J. L. 25, s. c. 36 Am. R. 501; *Boaz v. Central R., etc., Co.*, 87 Ga. 463, s. c. 13 S. E. R. 711; *Mobile, etc., R. Co. v. Mullins*, 70 Miss. 730, s. c. 12 So. R. 826; *Western R. Co. v. Harwell*, 91 Ala. 340, s. c. 45 Am. & Eng. R. Cas. 358.

its shoes it was held that the carrier was entitled to an instruction that if the injuries complained of were caused by the negligence of the plaintiff in such particulars he could not recover.<sup>1</sup> So, where the owner contracts to do the loading and negligently fails to close the door of the car he can not recover for cattle killed by jumping through the open door.<sup>2</sup> Indeed, it has been held that where a shipper who agrees to load the stock and knows that one of the car doors is unsafe merely neglects to inform the company's agent, who has no knowledge of the fact, the shipper can not recover for the escape of cattle through the door.<sup>3</sup> But it has been held, on the other hand, that the mere fact that the shipper, or his agent accompanies the stock,<sup>4</sup> or assists in loading or unloading,<sup>5</sup> or knows that the car or stock pens are defective,<sup>6</sup> will not necessarily constitute contributory negligence or relieve the carrier from responsibility. If, however, the shipper selects his own car, with knowledge of the defects,<sup>7</sup> or having full control negligently loads the stock,<sup>8</sup> or wrongfully and negligently inter-

<sup>1</sup> *Evans v. Fitchburg R. Co.*, 111 Mass. 142, s. c. 15 Am. R. 19. See, also, *Richardson v. Northeastern R. Co.*, L. R. 7 C. P. 75; *Northeastern R. Co. v. Richardson*, 41 L. J. C. P. 60.

<sup>2</sup> *Newby v. Chicago, etc., R. Co.*, 19 Mo. App. 391; *Hutchinson v. Chicago, etc., R. Co.*, 37 Minn. 524, s. c. 35 N. W. R. 433.

<sup>3</sup> *Betts v. Farmers', etc., Co.*, 21 Wis. 80, followed in *Miltimore v. Chicago, etc., R. Co.*, 37 Wis. 190; *Jenkins v. Chicago, etc., R. Co.*, 41 Wis. 112.

<sup>4</sup> *Moulton v. St. Paul, etc., R. Co.*, 31 Minn. 85, s. c. 47 Am. R. 781.

<sup>5</sup> *Combe v. London, etc., R. Co.*, 31 L. T. R. N. S. 613.

<sup>6</sup> *White v. Cincinnati, etc., R. Co.*, 89 Ky. 478, s. c. 12 S. W. R. 936, 42 Am. & Eng. R. Cas. 547; *Paddock v. Missouri Pac. R. Co.*, 1 Mo. App. R. 87; *Mason v. Missouri Pac. R. Co.*, 25 Mo. App. 473; *Pratt v. Ogdensburg,*

*etc., R. Co.*, 102 Mass. 557; *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, s. c. 18 S. W. R. 948; *Peters v. New Orleans, etc., R. Co.*, 16 La. Ann. 222. But see *Great Western R. Co. v. Hawkins*, 18 Mich. 427; *Chicago, etc., R. Co. v. Van Dresar*, 22 Wis. 511; *Harris v. Northern Indiana R. Co.*, 20 N. Y. 232.

<sup>7</sup> *Harris v. Northern Indiana R. Co.*, 20 N. Y. 232; *Coupland v. Housatonic, etc., R. Co.*, 61 Conn. 531, s. c. 23 Atl. R. 870; *Illinois Cent. R. Co. v. Hall*, 58 Ill. 409; *Chicago, etc., R. Co. v. Van Dresar*, 22 Wis. 511; *Carr v. Schafer*, 15 Colo. 48; *Squire v. New York Cent. R. Co.*, 98 Mass. 239.

<sup>8</sup> *East Tennessee, etc., R. Co. v. Whittle*, 27 Ga. 535; *Bowie v. Baltimore, etc., R. Co.*, 1 McArthur 94; *The Powhatan*, 21 Blatch. (U. S. C. C.) 18; *Hutchinson v. Chicago, etc., R. Co.*, 37 Minn. 524, s. c. 35 N. W. R. 433; *Fordyce v. McFlynn*, 56 Ark.

feres with the management of the animals during their transportation<sup>1</sup> and thus causes loss or injury to them he can not recover for such loss or injury.

§ 1551. **Cars and appliances—Terminal charges.**—As a general rule the carrier is bound to furnish suitable cars and appliances for the transportation of live stock,<sup>2</sup> but it is not bound to provide the "safest and best approved motive power with the best appliances in use."<sup>3</sup> Some of the authorities hold that the cars must be absolutely safe and sufficient,<sup>4</sup> but others, in stating the rule, say that they must be reasonably safe for the transportation of stock.<sup>5</sup> The carrier is bound to provide a suitable car, having in view the usual and ordinary conduct under such circumstances of stock of the kind which it undertakes to carry in the particular instance, even though such conduct may be the result of its natural propensities, but if such a car is provided and the animals are injured because of their natural propensity to kick or otherwise conduct themselves it is not liable in the absence of negligence in some other respect.<sup>6</sup> It must furnish a car strong enough to transport animals that are ordinarily unruly, but not such as are

424; *Fort Worth, etc., R. Co. v. Manchester, etc., R. Co.*, 16 Q. B. 600; *Word, (Tex. Civ. App.)* 32 S. W. R. 14.

<sup>1</sup> *Roderick v. Railroad Co.*, 7 W. Va. 54; *Lee v. Raleigh, etc., R. Co.*, 72 N. Car. 236; *Hart v. Chicago, etc., R. Co.*, 69 Iowa 485, s. c. 29 N. W. R. 597. *ante*, § 1478. A statute requiring railroad companies to furnish double-decked cars for sheep has been held constitutional. *Emerson v. St. Louis, etc., R. Co.*, 111 Mo. 161, s. c. 19 S. W. R. 1113. But see *Stanley v. Wabash, etc., R. Co.*, 100 Mo. 435, 3 Interstate Com. R. 176.

<sup>2</sup> *Smith v. New Haven, etc., R. Co.*, 12 Allen (Mass.) 531, s. c. 90 Am. Dec. 166; *Union Pac. R. Co. v. Rainey*, 19 Colo. 225, s. c. 34 Pac. R. 986, s. c. 61 Am. & Eng. R. Cas. 302; *Welsh v. Pittsburgh R. Co.*, 10 Ohio St. 65; *Indianapolis, etc., R. Co. v. Strain*, 81 Ill. 504; *Railroad Co. v. Pratt*, 22 Wall. (U. S.) 123; *St. Louis, etc., R. Co. v. Dorman*, 72 Ill. 504; *Haynes v. Wabash R. Co.*, 54 Mo. App. 582; *Rhodes v. Louisville, etc., R. Co.*, 9 Bush (Ky.) 688; *McDaniel v. Chicago, etc., R. Co.*, 24 Iowa 412; *Austin v.*

<sup>3</sup> *Illinois Cent. R. Co. v. Haynes*, 63 Miss. 485; *ante*, §§ 1472-1475.

<sup>4</sup> *Smith v. New Haven, etc., R. Co.*, 12 Allen (Mass.) 531.

<sup>5</sup> *Betts v. Chicago, etc., R. Co.*, (Iowa) 60 N. W. R. 623. See, also, *Morrison v. Phillip etc. Co.*, 44 Wis. 405, s. c. 28 Am. R. 599; *The Mondego*, 56 Fed. R. 268.

<sup>6</sup> *Betts v. Chicago, etc., R. Co.*, (Iowa) 60 N. W. R. 623.

unusually and extraordinarily vicious for animals of their kind,<sup>1</sup> at least, where it has no knowledge of that fact. It has been held that a connecting carrier is not bound to transport animals in the same car in which they were delivered to it;<sup>2</sup> and if it does do so it is liable for injuries caused by defects therein to the same extent as if it were its own car.<sup>3</sup> So, a railroad company may be liable for injuries caused by defects in its stock pens or platforms for loading and unloading stock.<sup>4</sup> But, as we have seen, where the shipper selects his own cars, with full knowledge of defects therein the better rule seems to be that he can not complain of injuries caused by such defects, especially if he has released the carrier and assumed all risk of injuries by reason thereof.<sup>5</sup> There is, however, some conflict among the authorities as to whether a provision relieving the carrier from liability, even in the absence of negligence, for injuries caused by unsafe, unsuitable or defective cars, or imposing upon the shipper the duty of determining their safety and sufficiency, is valid.<sup>6</sup> The authorities to which we have already referred in this section in support of the rule that it is the duty of railroad companies to furnish suitable cars and equipments for the transportation of live

<sup>1</sup> *Selby v. Wilmington, etc., R. Co.*, 113 N. Car. 588, s. c. 18 S. E. R. 88. See, also, *Wilson v. Hamilton*, 4 Ohio St. 722.

<sup>2</sup> *McAlister v. Chicago, etc., R. Co.*, 74 Mo. 351; *Combe v. London, etc., R. Co.*, 31 L. T. N. S. 613. See, also, *Morris v. Delaware, etc., R. Co.*, 2 Interstate Com. Rep. 617.

<sup>3</sup> *Wallingford v. Columbia, etc., R. Co.*, 26 S. Car. 258, s. c. 2 S. E. R. 19, 30 Am. & Eng. R. Cas. 40; *Combe v. London, etc., R. Co.*, 31 L. T. N. S. 613. See, also, *Louisville, etc., R. Co. v. Dies*, 91 Tenn. 177, s. c. 18 S. W. R. 266.

<sup>4</sup> *Cooke v. Kansas City, etc., R. Co.*, 57 Mo. App. 471; *Missouri, etc., R. Co. v. Woods*, (Tex. Civ. App.) 31 S.

W. R. 237; *Owen v. Louisville, etc., R. Co.*, 87 Ky. 626; *Chesapeake, etc., R. Co. v. American, etc., Bank*, (Va.) 23 S. E. R. 935.

<sup>5</sup> See, *ante*, §§ 1480, 1550.

<sup>6</sup> See *Squire v. New York Cent. R. Co.*, 98 Mass. 239; *Chippendale v. Lancashire, etc., R. Co.*, 7 Eng. L. & Eq. 395; *Kansas City, etc., R. Co. v. Holland*, 68 Miss. 351; *Wilson v. New York, etc., R. Co.*, 27 Hun (N. Y.) 149, 'upholding such contracts. But compare *Western R. Co. v. Harwell*, 91 Ala. 340, s. c. 45 Am. & Eng. R. Cas. 358; *Railroad Co. v. Pratt*, 22 Wall. (U. S.) 123; *Rhodes v. Louisville, etc., R. Co.*, 9 Bush (Ky.) 688; *Welsh v. Pittsburg, etc., R. Co.*, 10 Ohio St. 65.

stock are those in which the liability of such companies for injuries caused by defective or unsuitable cars and the like has been determined. The rule is not, however, limited, in its application, to such cases. A railroad company which is a common carrier of live stock is also liable for loss occasioned by its refusal or failure, upon proper request, to furnish any cars at all, without a good excuse.<sup>1</sup> It is, in general, bound to furnish suitable cars upon reasonable notice and with reasonable diligence whenever it can do so without jeopardizing its other business.<sup>2</sup> But the duty is not absolute under all circumstances to furnish any particular number of cars at any particular time, in the absence of a special contract.<sup>3</sup> Such a carrier is also bound to furnish such suitable stock pens, cattle chutes, or other facilities for loading and unloading stock as are reasonably sufficient for the business of the place, and it has been held that where a stock yard is required under this rule, the carrier can not exact terminal charges for receiving and delivering the cattle through such yard in addition to its regular and legitimate charges for transportation.<sup>4</sup> But it is held in a very recent case that a railroad company which has been accustomed to deliver cattle at the yards of a stock yard company, off of its own line, by transporting them over the

<sup>1</sup> Pittsburgh, etc., R. Co. v. Racer, 5 Ind. App. 209, s. c. 31 N. E. R. 853; Ballentine v. North Missouri R. Co., 40 Mo. 491, s. c. 93 Am. Dec. 315, and authorities cited in following note.

<sup>2</sup> Ayres v. Chicago, etc., R. Co., 71 Wis. 372, s. c. 37 N. W. R. 432, 5 Am. St. R. 226, 35 Am. & Eng. R. Cas. 679; Pruitt v. Hannibal, etc., R. Co., 62 Mo. 527; Guinn v. Wabash, etc., R. Co., 20 Mo. App. 453; Texas, etc., R. Co. v. Nicholson, 61 Tex. 491; Scofield v. Lake Shore, etc., R. Co., 2 Interstate Com. R. 67; Hazel Milling Co. v. St. Louis, etc., R. Co., 3 Interstate Com. R. 701; Newport News, etc., R. Co. v. Mercer, 96 Ky. 475, 29 S. W. R. 301.

<sup>3</sup> Ante, §§ 1470, 1472-1476; Richardson v. Chicago, etc., R. Co., 61 Wis.

596, s. c. 18 Am. & Eng. R. Cas. 530; Galena, etc., R. Co. v. Rae, 18 Ill. 488, s. c. 68 Am. Dec. 574, and note; Ballentine v. North Missouri R. Co., 40 Mo. 491, s. c. 93 Am. Dec. 315; Newport News, etc., R. Co. v. Mercer, 96 Ky. 475, 29 S. W. R. 301.

<sup>4</sup> Covington Stock Yards Co. v. Keith, 139 U. S. 128, s. c. 11 Sup. Ct. R. 461. See, also, Oregon, etc., R. Co. v. Ilwaco R. etc., Co., 51 Fed. R. 611; Indian River, etc., Co. v. East Coast Transp. Co., 28 Fla. 387, 10 So. R. 480; Kalamazoo Hack, etc., Co. v. Sootsma, 84 Mich. 194, s. c. 47 N. W. R. 667; Keith v. Kentucky Cent. R. Co., 1 Interstate Com. R. 601; Owen v. Louisville, etc., R. Co., 87 Ky. 626.

stock yard company's line and paying it a fixed sum per car for the right to do so, is under no obligation to a consignee whose place of business is at the stock yard to furnish pens, chutes, or other unloading facilities at its own station in a different part of the city, and is not, therefore, bound in default of such facilities at its own station, to deliver cattle at the stock yards without a separate or additional charge, but by complying with the interstate commerce law and posting schedules, may make a separate terminal charge for delivery at the stock yards.<sup>1</sup>

§ 1552. **Loading and unloading.**—We have shown, in the last preceding section, that it is the duty of a common carrier of live stock to provide reasonable facilities for loading and unloading the stock. It is also bound to afford the shipper reasonable opportunities to load and unload even where he assumes the duty of loading and unloading.<sup>2</sup> The duty to load and unload stock rests primarily upon the carrier, but it may be imposed upon the shipper by special contract.<sup>3</sup> If loss or injury is caused by the negligence of the shipper in such a case he can not recover therefor,<sup>4</sup> and so, if it is caused by his failure to comply with his contract.<sup>5</sup> But a railroad company must furnish proper facilities or opportunities for loading and

<sup>1</sup> Walker v. Keenan, 73 Fed. R. 755.

<sup>2</sup> Wabash, etc., R. Co. v. Pratt, 15 Ill. App. 177; Abrams v. Milwaukee, etc., R. Co., 87 Wis. 485; Bills v. New York Cent. R. Co., 84 N. Y. 5; Johnson v. Alabama, etc., R. Co., 69 Miss. 191; International, etc., R. Co. v. McRae, 82 Tex. 614, s. c. 18 S. W. R. 672; Dunn v. Hannibal, etc., R. Co., 68 Mo. 268; Owen v. Louisville, etc., R. Co., 87 Ky. 626, s. c. 9 S. W. R. 698. But see Roberts v. Great Western R. Co., 4 C. B. N. S. 506, 27 L. J. C. P. 266.

<sup>3</sup> Squire v. New York, etc., R. Co., 98 Mass. 239; South, etc., R. Co. v. Henlein, 52 Ala. 606, s. c. 23 Am. R. 578; Dawson v. St. Louis, etc., R. Co., 76 Mo. 514. Delivery is complete

when cattle are received in the company's pens ready for shipment. Gulf, etc., R. Co. v. Trawick, 80 Tex. 270, s. c. 15 S. W. R. 568; Pruitt v. Hannibal, etc., R. Co., 62 Mo. 527; Deming v. Grand Trunk R. Co., 48 N. H. 455.

<sup>4</sup> Newby v. Chicago, etc., R. Co., 19 Mo. App. 391; Ohio, etc., R. Co. v. Dunbar, 20 Ill. 623; Chicago, etc., R. Co. v. VanDresar, 22 Wis. 511; Fordyce v. McFlynn, 56 Ark. 424, s. c. 19 S. W. R. 961.

<sup>5</sup> Squire v. New York, etc., R. Co., 98 Mass. 239; Myers v. Wabash, etc., R. Co., 90 Mo. 98, s. c. 2 S. W. R. 263; Penn v. Buffalo, etc., R. Co., 49 N. Y. 204, s. c. 10 Am. R. 355.



unloading the stock and can not make a valid contract exempting itself from all liability by reason of its own negligence in that regard.<sup>1</sup> And so, on the other hand, it has been held that a contract that the shipper shall load and unload at his own risk does not deprive the carrier of the right to reasonably and justly determine when and where the exigencies of transportation may require the stock to be unloaded.<sup>2</sup> If the ways and means for loading are in proper condition and the shipper has assumed the duty of loading, he must have the car loaded so that the train which is to take it will not be unreasonably delayed, and if he fails to do so he can not recover as for a refusal to receive and carry the stock because the train did not wait for him to finish loading.<sup>3</sup>

§ 1553. **Duty to feed, water and care for stock.**—It is the duty of the carrier, where there is no special contract, to feed, water and care for the stock during transportation,<sup>4</sup> and it has been held that a usage or custom of the company requiring the shipper to accompany cattle and feed and water them at his own risk and expense will not relieve it from this duty and transfer it to the shipper.<sup>5</sup> So, the mere fact that the company gives the shipper a pass in order that he or his servant may accompany them will not relieve it from responsibility for its failure to take proper care of them.<sup>6</sup> But the

<sup>1</sup> *Abrams v. Milwaukee, etc., R. Co.*, 87 Wis. 485; *Norfolk, etc., R. Co. v. Sutherland*, 89 Va. 703; *Chesapeake, etc., R. Co. v. American, etc., Bank*, (Va.) 23 S. E. R. 935.

<sup>2</sup> *McAlister v. Chicago, etc., R. Co.*, 74 Mo. 351.

<sup>3</sup> *Louisville, etc., R. Co. v. Godman*, 104 Ind. 490, s. c. 4 N. E. R. 163; *Frazier v. Kansas City, etc., R. Co.*, 48 Iowa 571. But see *Illinois Cent. R. Co. v. Waters*, 41 Ill. 73; *Alabama, etc., R. Co. v. Sparks*, 71 Miss. 757.

<sup>4</sup> *Illinois Cent. R. Co. v. Adams*, 42 Ill. 474; *Toledo, etc., R. Co. v. Hamilton*, 76 Ill. 393; *Dunn v. Hannibal*,

*etc., R. Co.*, 68 Mo. 268; *Harris v. Northern Ind. R. Co.*, 20 N. Y. 232; *Alabama, etc., R. Co. v. Thomas*, 89 Ala. 294, s. c. 7 So. R. 762; *Bryant v. Southwestern R. Co.*, 68 Ga. 805, s. c. 6 Am. & Eng. R. Cas. 388; *Taff Vale R. Co. v. Giles*, 23 L. J. Q. B. 43. But see *Cragin v. New York, etc., R. Co.*, 51 N. Y. 61.

<sup>5</sup> *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, s. c. 2 L. R. A. 75, 9 S. W. R. 749.

<sup>6</sup> *Feinberg v. Delaware, etc., R. Co.*, 52 N. J. L. 451, s. c. 20 Atl. R. 33; *Clarke v. Rochester, etc., R. Co.*, 14 N. Y. 570, s. c. 67 Am. Dec. 205.

owner may assume the duty of feeding and watering the stock and relieve the company therefrom by a valid special contract.<sup>1</sup> Even then, however, the carrier must furnish proper facilities to the shipper for that purpose in order to escape liability,<sup>2</sup> and it has been held that it is not relieved from liability by reason of a great rush of business or the like.<sup>3</sup> It has also been held in Texas that the carrier can not avoid liability without offering the shipper an opportunity and reasonable facilities to feed and water the stock although he did not request it;<sup>4</sup> but in Mississippi it is held that an instruction that the carrier is liable if it failed to give the shipper an opportunity to feed and water the stock is erroneous, where there is a special contract in which the shipper assumes that duty and no evidence that he requested the carrier to give him an opportunity to do so.<sup>5</sup>

§ 1554. **Statutory regulations.**—In many of the states it is provided by statute that live stock transported by railroad companies shall not be confined for a longer time than a certain period therein specified without food and water.<sup>6</sup> So, it

<sup>1</sup> *Central R. Co. v. Bryant*, 73 Ga. 722; *Georgia, etc., R. Co. v. Reid*, 91 Ga. 377, s. c. 17 S. E. R. 934; *South, etc., R. Co. v. Henlein*, 52 Ala. 606, s. c. 23 Am. R. 578; *Boaz v. Central, etc., R. Co.*, 87 Ga. 463; *Heineman v. Grand Trunk R. Co.*, 31 How. Pr. (N. Y.) 430; *Ft. Worth, etc., R. Co. v. Daggett*, 87 Tex. 322, s. c. 28 S. W. R. 525, 61 Am. & Eng. R. Cas. 322; *Duvenick v. Missouri Pac. R. Co.*, 57 Mo. App. 550.

<sup>2</sup> *Wabash, etc., R. Co. v. Pratt*, 15 Ill. App. 177; *Taylor, etc., R. Co. v. Montgomery*, 4 Tex. App. (Civil Cases) 401, s. c. 16 S. W. R. 178; *Dunn v. Hannibal, etc., R. Co.*, 68 Mo. 268; *Clarke v. Rochester, etc., R. Co.*, 14 N. Y. 570; *Abrams v. Milwaukee, etc., R. Co.*, 87 Wis. 485, s. c. 61 Am. & Eng. R. Cas. 313; *Smith v. Michigan Cent. R. Co.*, 100 Mich. 148, s. c. 58 N.

W. R. 651; *Gulf, etc., R. Co. v. Gann*, 8 Tex. Civ. App. 620, 28 S. W. R. 349.

<sup>3</sup> *International, etc., R. Co. v. Lewis*, (Tex. Civ. App.) 23 S. W. R. 323; *Nashville, etc., R. Co. v. Heggie*, 86 Ga. 210, s. c. 12 S. E. R. 363; *Gulf, etc., R. Co. v. McAulay*, (Tex. Civ. App.) 26 S. W. R. 475.

<sup>4</sup> *Taylor, etc., R. Co. v. Montgomery*, 4 Tex. App. (Civil Cases) 401, s. c. 16 S. W. R. 178. See, also, *Nashville, etc., R. Co. v. Heggie*, 86 Ga. 210, s. c. 12 S. E. R. 363.

<sup>5</sup> *Mobile, etc., R. Co. v. Francis*, (Miss.) 9 So. R. 508.

<sup>6</sup> Other or additional statutory regulations also exist in some of the states. Most of them are referred to in 3 Am. & Eng. Ency. of Law. 16g. See, also, "Transportation of Live Stock," 19 Cent. L. Jour. 161, 168.

is provided by act of congress that no railroad company "whose road forms any part of a line of road over which cattle, sheep, swine or other animals are conveyed from one state to another" shall confine such stock in cars for a longer period than twenty-eight consecutive hours, without unloading the same for rest, water and feeding, unless prevented from so unloading by storm or other accidental causes.<sup>1</sup> It is also provided that animals so unloaded shall be properly fed and watered during such rest by the owner or person having the custody thereof, or, in case he fails to do so, by the railroad company, which shall have a lien thereon for food, care and custody furnished, and shall not be liable for any detention of such animals.<sup>2</sup> The penalty for failure to comply with the requirements of the statute is fixed at not less than one hundred nor more than five hundred dollars, to be recovered in a civil action in the name of the United States.<sup>3</sup> It has been held that this statute is constitutional, as being within the power of congress to regulate interstate commerce;<sup>4</sup> that it applies only to the carriage of animals from one state to another, and not where the shipment is from one point to another in the same state;<sup>5</sup> that the confinement of the entire number of animals in one shipment without unloading for rest, water and feeding in violation of the statute is a single offense, so that the penalty which it prescribes can not be multiplied by the number of animals carried,<sup>6</sup> and that the carrier is not excused from unloading as the statute requires by reason of an accident due to its own negligence.<sup>7</sup> The statute does not, of course, authorize the carrier to confine the animals for twenty-eight hours

<sup>1</sup> U. S. Rev. St., § 4386. It is provided in another section, however, that when animals are carried in cars "in which they can and do have proper food, water, space, and opportunity to rest, the provisions in regard to their being unloaded shall not apply." U. S. Rev. St., § 4388.

<sup>2</sup> U. S. Rev. St., § 4387.

<sup>3</sup> U. S. Rev. St., §§ 4388, 4389.

<sup>4</sup> *United States v. Boston, etc., R. Co.*, 15 Fed. R. 209.

<sup>5</sup> *United States v. East Tennessee, etc., R. Co.*, 13 Fed. R. 642, s. c. 9 Am. & Eng. R. Cas. 259.

<sup>6</sup> *United States v. Boston, etc., R. Co.*, 15 Fed. R. 209.

<sup>7</sup> *Newport News, etc., Co. v. United States*, 61 Fed. R. 488. See, also, *Nashville, etc., R. Co. v. Heggie*, 86 Ga. 210, s. c. 12 S. E. R. 363.

without food or water if it would be negligent to do so, nor does it relieve the carrier from its common law liability to the owner in damages for injuries or loss caused by its neglect to unload them or its failure to furnish him with facilities or opportunities for so doing.<sup>1</sup> Indeed, it has been held that the statute gives the shipper a cause of action for damages for loss or injuries resulting from its violation, which is enforceable in the state courts,<sup>2</sup> and that the violation of its provisions by keeping live stock upon the cars for more than twenty-eight consecutive hours, without unloading them for rest, water and feeding, is negligence *per se*.<sup>3</sup> But it has also been held that the complaint should negative the two exceptions contained in the statute,<sup>4</sup> and that damages can not be recovered from a railroad company for carrying cattle for more than twenty-eight hours without unloading them where there is a special contract that the shipper shall feed and water them at his own risk, and the evidence is not sufficiently specific to show how much of the damage was caused by the failure to feed and water, the cattle being in poor condition when shipped.<sup>5</sup> So, where cattle were unloaded and detained twelve hours for rest, water and food in order to comply with the statute, but were reloaded and taken to their destination on the first regular train after they were unloaded it was held that the company was not liable in an action for damages resulting from the delay.<sup>6</sup>

§ 1555. **Liability for delay.**—We have elsewhere considered the duty of common carriers to transport goods without unreasonable delay and their liability for negligently failing to transport and deliver good within a reasonable time,<sup>7</sup> and little

<sup>1</sup> Missouri Pac. R. Co. v. Ivy, 79 Tex. 444, s. c. 15 S. W. R. 692; Chesapeake, etc., R. Co. v. American, etc., Bank, (Va.) 23 S. E. R. 935; Ft. Worth, etc., R. Co. v. Daggett, 87 Tex. 322, s. c. 28 S. W. R. 525.

<sup>2</sup> Chesapeake, etc., R. Co. v. American, etc., Bank, (Va.) 23 S. E. R. 935.

<sup>3</sup> Nashville, etc., R. Co. v. Heggie, 86 Ga. 210, s. c. 12 S. E. R. 363.

<sup>4</sup> Hale v. Missouri Pac. R. Co., 36 Neb. 266, s. c. 54 N. W. R. 517.

<sup>5</sup> Missouri Pac. R. Co. v. Texas, etc., R. Co., 41 Fed. R. 913.

<sup>6</sup> Galveston, etc., R. Co. v. Warnken, (Tex. Civ. App.) 35 S. W. R. 72.

<sup>7</sup> *Ante*, §§ 1482-1489.

remains to be said upon the general subject. It is the duty of a carrier of live stock, as it is that of a carrier of goods, to forward the stock without unreasonable delay,<sup>1</sup> and to complete the carriage within a reasonable time.<sup>2</sup> If it negligently fails to do so, it will be liable for all damages naturally and proximately resulting from such neglect.<sup>3</sup> A delay in the shipment of cattle from six o'clock Friday evening to four o'clock Saturday morning, whereby they arrived at their destination too late for the Saturday market has been held an unreasonable delay where the carrier had means at hand for immediate shipment.<sup>4</sup> But the carrier is not an insurer against delays, and a delay may be excusable or reasonable under some circumstances when it would not be under others.<sup>5</sup> It can not be said as a matter of law that the shipment must necessarily be made on the first train which leaves after the stock has been delivered for transportation.<sup>6</sup> So, it is obvious that where separate cars are required for an unusually large shipment of live stock the carrier ought not to be held liable for reasonable delay required to obtain the cars, where the shipper has not notified it in ad-

<sup>1</sup> Philadelphia, etc., R. Co. v. Lehman, 56 Md. 209, s. c. 6 Am. & Eng. R. Cas. 194; Leonard v. Chicago, etc., R. Co., 54 Mo. App. 293; Gulf, etc., R. Co. v. McCorquodale, 71 Tex. 41, s. c. 9 S. W. R. 80; Smith v. Cleveland, etc., R. Co., 92 Ga. 539, 18 S. E. R. 977.

<sup>2</sup> Wabash, etc., R. Co. v. McCasland, 11 Ill. App. 491; Ohio, etc., R. Co. v. Dunbar, 20 Ill. 623; Gulf, etc., R. Co. v. Ellison, 70 Tex. 491, s. c. 7 S. W. R. 785; Tucker v. Pac. R. Co., 50 Mo. 385; Baker v. Louisville, etc., Co., 10 Lea (Tenn.) 304, s. c. 16 Am. & Eng. R. Cas. 149; ante, § 1520.

<sup>3</sup> See, generally, Richmond, etc., R. Co. v. Trousdale, 99 Ala. 389, s. c. 13 So. R. 23; Louisville, etc., R. Co. v. Brinley, (Ky.) 29 S. W. R. 305; Balfentine v. North Missouri R. Co., 40 Mo. 491, s. c. 93 Am. Dec. 315; Sturgeon v. St. Louis, etc., R. Co., 65 Mo. 569; Boaz v. Central R., etc., Co., 87

Ga. 463, s. c. 13 S. E. R. 711; Ayres v. Chicago, etc., R. Co., 71 Wis. 372; Hudson v. Northern Pac. R. Co., (Iowa) 60 N. W. R. 608, s. c. 61 Am. & Eng. R. Cas. 329; Ft. Worth, etc., R. Co. v. Greathouse, 82 Tex. 104, s. c. 17 S. W. R. 834.

<sup>4</sup> Cincinnati, etc., R. Co. v. Case, 122 Ind. 310, s. c. 23 N. E. R. 797, 42 Am. & Eng. R. Cas. 537.

<sup>5</sup> Ante, §§ 1483, 1484.

<sup>6</sup> Pennsylvania R. Co. v. Clark, 2 Ind. App. 146. But see Illinois Cent. R. Co. v. Waters, 41 Ill. 73. Nor, it seems, that a shipment on the next train is in time, regardless of the time when it left and of the carrier's facilities for avoiding delay. Galveston, etc., R. Co. v. Tuckett, (Tex. Civ. App.) 25 S. W. R. 150 and 670. But it seems to us that if the train ran on schedule time the shipper ought to take notice of it.

vance and is informed that there will be such delay. It has been held that a severe snowstorm, or other atmospheric conditions beyond the carrier's control will excuse a delay in shipping where the carrier is free from negligence,<sup>1</sup> and that a delay caused by an unusual and exceptional press of business,<sup>2</sup> or by a mob<sup>3</sup> is not necessarily unreasonable, or such as to render the carrier liable. The carrier should, however, take proper precautions to preserve the stock from injury and loss during the delay.<sup>4</sup> So, if the carrier knows that there is likely to be an unusual delay because of washouts, broken bridges, press of business, or the like, it should inform the shipper,<sup>5</sup> and if it expressly agrees to transport and deliver stock within a certain time it may thereby render itself liable for failure to do so, although prevented by a rush of business or some accident not the result of its own negligence.<sup>6</sup>

§ 1556. **Liability for loss or failure to deliver.**—A carrier of live stock “must deliver the cattle to the party designated by

<sup>1</sup> *International, etc., R.Co. v. Hynes*, 3 Tex. Civ. App. 20, s. c. 21 S. W. R. 622; *Ballentine v. North Missouri R. Co.*, 40 Mo., 491; *Black v. Chicago, etc., R. Co.*, 30 Neb. 197, s. c. 46 N. W. R. 428; *San Antonio, etc., R. Co. v. Barnett*, (Tex. Civ. App.) 27 S. W. R. 676. But see *Gwinn v. Wabash, etc., R. Co.*, 20 Mo. App. 453; *Pruitt v. Hannibal, etc., R. Co.*, 62 Mo. 527; *Gulf, etc., R. Co. v. McCorquodale*, 71 Tex. 41, s. c. 9 S. W. R. 80.

<sup>2</sup> *Illinois Cent. R. Co. v. Haynes*, 64 Miss. 604, s. c. 1 So. R. 765; *ante*, § 1482, note 3 on page 2302. But see *Gulf, etc., R. Co. v. McAulay*, (Tex. Civ. App.) 26 S. W. R. 475.

<sup>3</sup> *Geismer v. Lake Shore, etc., R. Co.*, 102 N. Y. 563; *Louisville, etc., R. Co. v. Hart*, 119 Ind. 273, s. c. 4 L. R. A. 549 (strikers); *Lake Shore, etc., R. Co. v. Bennett*, 89 Ind. 457, s. c. 6 Am. & Eng. R. Cas. 391.

<sup>4</sup> *International, etc., R.Co. v. Hynes*, 3 Tex. Civ. App. 20, s. c. 21 S.W. R. 622; *Feinberg v. Delaware, etc., R. Co.*, 52 N. J. L. 451, s. c. 20 Atl. R. 33; *Kinick v. Chicago, etc., R. Co.*, 69 Iowa 665, s. c. 29 N. W. R. 772; *ante*, § 1486.

<sup>5</sup> *Gwinn v. Wabash, etc., R. Co.* 20 Mo. App. 453; *ante*, § 1487. But see *Palmer v. Atchison, etc., R. Co.*, 101 Cal. 187, 35 Pac. R. 630.

<sup>6</sup> *Gulf, etc., R. Co. v. McCorquodale*, 71 Tex. 41, s. c. 9 S. W. R. 80; *Corbett v. Chicago, etc., R. Co.*, 86 Wis. 82; *Lake Erie, etc., R. Co. v. Rosenberg*, 31 Ill. App. 47; *Harmony v. Bingham*, 12 N. Y. 99, s. c. 62 Am. Dec. 142; *Hand v. Baynes*, 4 Whart. (Pa.) 204, s. c. 33 Am. Dec. 54; *International, etc., R. Co. v. Ritchie*, (Tex. Civ. App.) 26 S. W. R. 840; *Illinois Cent. R. Co. v. Simmons*, 49 Ill. App. 443. But see *Newport News, etc., R. Co. v. Mercer*, 96 Ky. 475, 29 S. W. R. 301.

the terms of shipment, or to his order, at the place of destination, and where it delivers them to one not entitled to receive them it is accountable."<sup>1</sup> The rule requiring a delivery to the right person is the same as that which applies generally to common carriers of goods.<sup>2</sup> As we have already treated the general subject in that connection it is sufficient at this place to give a few illustrative cases in which the question of the liability of the carrier for the loss or misdelivery of live stock was involved. In one of the most recent cases upon the subject it appeared that the plaintiff had agreed to load and unload the cattle and the defendant had provided necessary arrangements for unloading, feeding and reloading them at a proper place, but the carrier's servants undertook that duty, and, in performing it, negligently mixed some of the plaintiff's cattle with those belonging to another shipper and sent them to the latter, without the plaintiff's fault. It was held that the defendant was liable for the loss thus caused.<sup>3</sup> So, where the shipper loaded his stock into a car pointed out to him by the company's agent, and, by mistake of an employe of the company in numbering the car, it was billed to another person, and the stock lost to the plaintiff, the company was held liable.<sup>4</sup>

§ 1557. **Limiting liability.**—The carrier needs no special contract limiting its liability in respect to injuries resulting to animals from their own inherent nature or propensities.<sup>5</sup> In New York, where, as we have seen, a carrier is permitted

<sup>1</sup> North Pennsylvania R. Co. v. Commercial Nat. Bank, 123 U. S. 727, s. c. 8 Sup. Ct. R. 266; note to Duntley v. Boston, etc., R. Co., 66 N. H. 263, 9 L. R. A. 449, 451. But see Ryder v. Burlington, etc., R. Co., 51 Iowa 460, s. c. 1 N. W. R. 747.

<sup>2</sup> See *ante*, §§ 1517, 1523. As to liability for misdelivery, see *ante*, § 1526.

<sup>3</sup> Norfolk, etc., R. Co. v. Sutherland, 89 Va. 703, s. c. 17 S. E. R. 127.

<sup>4</sup> Chicago, etc., R. Co. v. Ames, 40 Ill. 249; Wilson v. Wabash, etc., R.

Co., 23 Mo. App. 50. But see Indianapolis, etc., R. Co. v. Murray, 72 Ill. 128; Illinois Cent. R. Co. v. Cobb, 72 Ill. 148.

<sup>5</sup> Boehl v. Chicago, etc., R. Co., 44 Minn. 191, s. c. 46 N. W. R. 333. This follows from the rule that the carrier is not liable in such a case as an insurer in any event at common law. But such contracts are usually made, and it is well for the carrier to have such a stipulation in its contracts.

to contract against liability for negligence, it has been held that, as the common law liability of carriers is not the same in the case of live stock as in other cases, an assumption by the shipper of the risk of injury to the stock by heat must be construed to include the risk of injury by heat occasioned by the negligence of the carrier's servants in not watering and cooling the stock; otherwise the stipulation of the shipper assuming such risk could mean nothing.<sup>1</sup> The case to which we refer, has, however, been distinguished and apparently limited in later cases in the same state,<sup>2</sup> and, even if good law there, it does not correctly state the rule which prevails in most jurisdictions. As a carrier of live stock is a common carrier it can no more stipulate for an exemption from liability for its own negligence in such cases than any common carrier can in any other case. It can, doubtless, stipulate against liability on account of injuries caused by the inherent nature and propensities of the live stock, but such a stipulation would generally be unnecessary. It may be that, owing to the peculiar nature of the freight, a particular stipulation limiting the liability of the carrier might be considered reasonable in the case of live stock where it would not be so considered in other cases, but in the main at least the rules governing such contracts are substantially the same as those which apply where ordinary freight is shipped under special contracts limiting liability, and the whole subject has been sufficiently treated elsewhere.<sup>3</sup>

<sup>1</sup> *Cragin v. New York, etc., R. Co.*, 51 N. Y. 61.

<sup>2</sup> See *Mynard v. Syracuse, etc., R. Co.*, 71 N. Y. 180.

<sup>3</sup> See chapter lxi, particularly, § 1511.



## CHAPTER LXV.

### FREIGHT CHARGES AND DEMURRAGE.

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|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>§ 1558. Generally.</p> <p>1559. Who is liable for freight charges.</p> <p>1560. Amount of compensation.</p> <p>1561. How compensation is calculated.</p> <p>1562. Compensation <i>pro rata intin-eris</i>.</p> <p>1563. Excessive and unreasonable charges.</p> <p>1564. Rights and remedies where excessive charges are demanded.</p> | <p>§ 1565. Discrimination—Rebates.</p> <p>1566. Compensation for special services.</p> <p>1567. Demurrage.</p> <p>1568. Car service associations.</p> <p>1569. Collecting charges—Connecting carriers.</p> <p>1570. Carrier's lien for freight.</p> <p>1571. Enforcement of lien.</p> <p>1572. Waiver and loss of lien.</p> |
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§ 1558. **Generally.**—The right to remuneration or compensation in some form is one of the distinguishing marks of a common carrier and is essential in order to render it liable as such rather than as a mere gratuitous bailee.<sup>1</sup> A common carrier, therefore, has the right to make reasonable charges for its services and the responsibility and risks it takes upon itself in the carriage of goods. It has been held that such charges, or "freight," as they are sometimes called, may be demanded in advance and that payment thereof may be made a condition of the acceptance and carriage of the goods.<sup>2</sup>

<sup>1</sup>Central, etc., R. Co. v. Lampley, 76 Ala. 357, s. c. 52 Am. R. 334; Citizens' Bank v. Nantucket, etc., Co., 2 Story (U. S. C. C.) 16; Kirtland v. Montgomery, 1 Swan (Tenn.) 452; Place v. Union Exp. Co., 2 Hilt. (N. Y.) 19.

<sup>2</sup>Randall v. Richmond, etc., R. Co., 108 N. Car. 612, s. c. 13 S. E. R. 137, 49 Am. & Eng. R. Cas. 74; Allen v. Cape Fear, etc., R. Co., 100 N. Car. 397, s. c. 35 Am. & Eng. R. Cas. 532; Pickford v. Grand Junction R. Co., 8 M. & W. 372; Bastard v. Bastard, 2 Shower 81; Central, etc., R. Co. v. Morris, 68 Tex. 49; Knight v. Providence, etc., R. Co., 13 R. I. 572, s. c. 9 Am. & Eng. R. Cas. 90.

But, unless there is some agreement to that effect, the general rule is that it is not payable until the goods are delivered, or ready to be delivered to the person having the right to receive them,<sup>1</sup> and that the carrier is entitled to freight only on the goods which it delivers.<sup>2</sup> If it loses part of the goods it may still be entitled to freight on those which it delivers, but not upon those which it has lost and failed to deliver.<sup>3</sup> In this country the owner, when sued for the freight, may generally set up any breach of its contract by the carrier and have the damages resulting therefrom applied in reduction of its claim.<sup>4</sup> In England, however, it seems that the carrier is entitled to its full freight upon delivery of the goods, even though they may have been damaged by its fault, and the owner can only recover for his loss in a separate action.<sup>5</sup> Although the car-

<sup>1</sup> *Brittan v. Barnaby*, 21 How. (U. S.) 527, 538. See, also, *Wilson v. Grand Trunk R. Co.*, 56 Me. 60; *Columbus Southern R. Co. v. Woolfolk*, 94 Ga. 507, s. c. 20 S. E. R. 119; *Grand Rapids, etc., R. Co. v. Diether*, 10 Ind. App. 206, s. c. 37 N. E. R. 39, 1069; *Evansville, etc., R. Co. v. Keith*, 8 Ind. App. 57, s. c. 35 N. E. R. 296; *Barnes v. Marshall*, 18 Q. B. 785, s. c. 21 L. J. Q. B. 388; *China, etc., Co. v. Force*, 142 N. Y. 90; *East Tenn., etc., R. Co. v. Hunt*, 15 Lea (Tenn.) 261.

<sup>2</sup> *New York Cent., etc., R. Co. v. Standard Oil Co.*, 87 N. Y. 486, and authorities cited in following note.

<sup>3</sup> *Gibson v. Brown*, 44 Fed. R. 98; *The Tangier*, 32 Fed. R. 230; *The Brig Collenberg*, 1 Black (U. S.) 170; *Price v. Hartshorn*, 44 Barb. (N. Y.) 655; *Gibson v. Sturge*, 10 Exch. 622; *British, etc., Co. v. Southern Pac. Co.*, 55 Fed. R. 82. Unless prevented by the owner or party by whom the freight is payable. *Meissner v. Brun*, 128 U. S. 474, s. c. 9 Sup. Ct. R. 139; *Wood v. Hubbard*, 62 Fed. R. 753; *Gage v. Maryland Coal Co.*, 124 Mass. 442; *Braithwaite v. Power*, 1 N. Dak.

455, s. c. 48 N. W. R. 354, and numerous authorities cited in the opinion. There are, however, cases in which, by its own act, it may lose its right to any part of the charges. *Western Transp. Co. v. Hoyt*, 69 N. Y. 230; *The Cito*, L. R. 7 P. Div. 5. So, generally, no freight can be collected if delivery of part is not accepted and the freight is not payable in a gross sum. *Sayward v. Stevens*, 3 Gray (Mass.) 97; *One Hundred, etc., Tons of Coal*, 9 Ben. (U. S. C. C.) 400; *Clark v. Masters*, 1 Bosw. 177; *Britan v. Barnaby*, 21 How. (U. S.) 527.

<sup>4</sup> *Gleadell v. Thomson*, 56 N. Y. 194; *Leech v. Baldwin*, 5 Watts (Pa.) 446; *Boggs v. Martin*, 13 B. Mon. (Ky.) 239; *Fitchburg, etc., R. Co. v. Hanna*, 6 Gray (Mass.) 539; *Hill v. Leadbetter*, 42 Me. 572; *Dyer v. Grand Trunk R. Co.*, 42 Vt. 441; *The Tangier*, 32 Fed. R. 230; *The Success*, 7 Blatch. (U. S. C. C.) 551; *Page v. Munro*, 1 Holmes (U. S. C. C.) 232; *La Motte v. Angel*, 11 Hawaiian Rep. 136; *Strong v. Grand Trunk R. Co.*, 15 Mich. 206, s. c. 93 Am. Dec. 184.

<sup>5</sup> *Dakin v. Oxley*, 15 Com. B. (N. S.)

rier may be held liable in a proper case for loss or injury to the goods, if it carries them and is ready to deliver them it is entitled to its freight even though they have become worthless, from internal causes or other causes for which it is not responsible.<sup>1</sup> So, if it loses the goods, but pays their full value, it is entitled to have the freight deducted,<sup>2</sup> and in an action against it for damages caused by loss or injury to the goods the plaintiff can not recover freight which he has paid, and if he has not paid it, the carrier is usually entitled to have it deducted.<sup>3</sup>

§ 1559. **Who is liable for freight charges.**—In the absence of anything to the contrary the consignee is presumed to be the owner of goods shipped to him and is *prima facie* liable for the freight, so that if he accepts them the law implies a promise on his part to pay it.<sup>4</sup> The rule which prevails in

646. It is said that a set-off is now permitted in England under a recent statute. 8 Am. & Eng. Ency. of Law, 977.

<sup>1</sup> *Seaman v. Adler*, 37 Fed. R. 268; *Griswold v. New York Ins. Co.*, 3 Johns (N. Y.) 321; *McGaw v. Ocean Ins. Co.*, 23 Pick. (Mass.) 405; *Jordan v. Warren Ins. Co.*, 1 Story (U. S. C. C.) 342.

<sup>2</sup> *Bazin v. Liverpool, etc.*, S. S. Co., 3 Wall. Jr. 229, 20 Law R. 129, s. c. 5 Am. L. Reg. 459; *Arthur v. The Cassius*, 2 Story (U. S. C. C.) 81; *Knox v. The Ninetta, Crabbe* (U. S. C. C.) 534; *Hammond v. McClures*, 1 Bay (S. Car.) 101.

<sup>3</sup> *Galveston, etc.*, R. Co. v. Ball, 80 Tex. 602, s. c. 16 S. W. R. 441; *Gulf, etc.*, R. Co. v. Kemp, (Tex. Civ. App.) 30 S. W. R. 714; *Michigan, etc.*, R. Co. v. Caster, 13 Ind. 164; *Massachusetts, etc.*, Co. v. Fitchburg, etc., R. Co., 143 Mass. 318, s. c. 9 N. E. R. 669; *Woodward v. Illinois Cent. R. Co.*, 1 Biss. (U. S. C. C.) 403. But

compare *Bamberg v. South Carolina R. Co.*, 9 S. Car. 61; *Louisville, etc.*, R. Co. v. Craycraft, (Ind. App.) 39 N. E. R. 523.

<sup>4</sup> *Davison v. City Bank*, 57 N. Y. 81; *Dayton v. Parke*, 67 Hun 137, s. c. 22 N. Y. Supp. 613; *Merrick v. Gordon*, 20 N. Y. 93; *Wegener v. Smith*, 15 Com. B. 285; *Cock v. Taylor*, 13 East 399; *Sanders v. Vanzeller*, 4 Q. B. 260; *Philadelphia, etc.*, R. Co. v. Barnard, 3 Ben. (U. S. C. C.) 39; *Gates v. Ryan*, 37 Fed. R. 154; *North German Lloyd v. Heule*, 44 Fed. R. 100; *Irzo v. Perkins*, 10 Fed. R. 779. But see *Ewell v. Skiddy*, 77 N. Y. 282. So, custom and the previous course of dealing between the parties may give rise to an implication that the consignee is to pay the freight. *Wilson v. Kymer*, 1 M. & S. 157. And ownership is generally the test for determining who is liable where there are intermediate consignees. *Spencer v. White*, 1 Ired. Law 236; *Dart v. Ensign*, 47 N. Y. 619; *Chitty on Car-*

England and in most jurisdictions in this country is thus stated in a well known text book: "The contract for carriage is, in the absence of any express agreement, presumed to be between the carrier and the person at whose risk the goods are carried, *i. e.*, the person whose they are, and who would suffer if the goods were lost. \* \* \* When, therefore, goods are sent to a person who has purchased them, or are shipped under a bill of lading by a person's order and on his account, the consignee, as being the person at whose risk the goods are, is considered the person with whom the contract is made. He is liable to pay for the carriage and is the proper person to sue the carrier for a breach of contract."<sup>1</sup> But the presumption that the consignee is the owner and liable for the freight is rebuttable, and if he is not the owner and refuses to accept the goods no promise on his part to pay the freight can be implied from the mere fact that they are consigned to him.<sup>2</sup> So, much may depend upon the contract showing the intention of the parties in the particular instance.<sup>3</sup> And if the consignee assigns the bill of lading before the goods are delivered to him his in-

riers, 209; *Canfield v. Northern R. Co.*, 18 Barb. (N. Y.) 586. In Massachusetts, however, it is held in a recent case "when the vendor of goods delivers them to a railroad to be carried to the purchaser, although the title passes to the purchaser by the delivery to the railroad company, and the name and address of the consignee, who is the purchaser, is known to the company, the vendor is presumed to make the contract for transportation with the company on his own behalf and is held liable to the company for the payment of the freight. This presumption, however, is a disputable one, and may be rebutted or disproved by evidence, and if the vendee has ordered the goods to be sent at his risk, and on his account, he also may be held liable as the real principal in the contract." *Union Freight R. Co. v. Winkley*, 159

Mass. 133, s. c. 34 N. E. R. 91, 55 Am. & Eng. R. Cas. 695. Compare *Old Colony R. Co. v. Wilder*, 137 Mass. 536.

<sup>1</sup> Dicey on Parties to Actions, 87.

<sup>2</sup> *Hinsdell v. Weed*, 5 Denio (N. Y.) 172; *Davis v. Pattison*, 24 N. Y. 317; *Elwell v. Skiddy*, 77 N. Y. 282; *Boston, etc., R. Co. v. Whitcher*, 1 Allen (Mass.) 497; *Coleman v. Lambert*, 5 M. & W. 502; *Scaife v. Tobin*, 3 B. & Ad. 523; *Amos v. Temperley*, 8 M. & W. 798; *Spencer v. White*, 1 Ired. Law 236; *Miner v. Norwich, etc., R. Co.*, 32 Conn. 91. But see *Sheets v. Wilgus*, 56 Barb. (N. Y.) 662. A bill of lading directing goods to be delivered to one person for the use of another vests the title in the latter. *Grove v. Brien*, 8 How. (U. S.) 429.

<sup>3</sup> See *Boston, etc., R. Co. v. Whitcher*, 1 Allen (Mass.) 497; *Myers v. The Queensmore*, 53 Fed. R. 1022.

dorsee, by accepting them, becomes liable, and the carrier, by delivering them to the latter, releases the consignee unless the indorsee received them as the consignee's agent.<sup>1</sup> The carrier's remedy against the consignee, even where he might be held liable for the freight as owner of the goods, is not necessarily exclusive. If the shipper contracts in his own behalf it is but just to hold him liable, especially where the consignee refuses to accept the goods and pay the freight, and it has been held that the carrier is not obliged to collect the freight from the consignee even under a bill of lading containing the clause, "he paying the freight thereon."<sup>2</sup>

§ 1560. Amount of compensation.—The general rule is that a common carrier is bound to carry for all for a reasonable compensation, or, as is sometimes said, at a reasonable rate.<sup>3</sup> The fact that some one else is charged less for similar services may be evidence tending to show that a charge is unreasonable, but it would seem that "charging another person too little is not charging you too much,"<sup>4</sup> and that it does not necessarily follow that the rate is unreasonable merely from the fact

<sup>1</sup>Tobin v. Crawford, 5 M. & W. 235; Cock v. Taylor, 13 East 399.

<sup>2</sup>Great Western R. Co. v. Bagge, etc., Co., L. R. 15 Q. B. Div. 625, s. c. 23 Am. & Eng. R. Cas. 715. See, also, Ward v. Felton, 1 East 507; Shepard v. De Bernales, 13 East 565; Spencer v. White, 1 Ired. Law 236; Miner v. Norwich, etc., R. Co., 32 Conn. 91; Holt v. Westcott, 43 Me. 445, s. c. 69 Am. Dec. 74; Blanchard v. Page, 8 Gray (Mass.) 281; Wooster v. Tarr, 8 Allen (Mass.) 270; Thomas v. Snyder, 39 Pa. St. 317; Hayward v. Middleton, 3 McCord (S. Car.) 121; Barker v. Havens, 17 Johns. (N. Y.) 234; Jobbitt v. Goundry, 29 Barb. (N. Y.) 509. As shown in some of these cases, however, the carrier may forfeit this right against the consignor by making a new contract with the consignee or the like.

<sup>3</sup>Cook v. Chicago, etc., R. Co., 81 Iowa 551, s. c. 46 N. W. R. 1080, 3 Lewis' Am. R. & Corp. R. 550; Scott v. Midland R. Co., 33 U. C. Q. B. 580; Ragan v. Aiken, 9 Lea (Tenn.) 609, s. c. 42 Am. R. 684, 9 Am. & Eng. R. Cas. 201; Illinois & St. L. R. Co. v. Beaird, 24 Ill. App. 322; New England Ex. Co. v. Maine Cent. R. Co., 57 Me. 188, s. c. 9 Am. L. Reg. (N. S.) 728, and note; McDuffee v. Portland, etc., R. Co., 52 N. H. 430; Harris v. Packwood, 3 Taunt. 264; ante, §§ 1465, 1467. See, also, note in 8 Lewis' Am. R. & Corp. R. 722.

<sup>4</sup>Per Crompton, J., in Garton v. Bristol, etc., R. Co., 1 B. & S. 112, 154; Johnson v. Pensacola, etc., R. Co., 16 Fla. 623; Fitchburg R. Co. v. Gage, 12 Gray (Mass.) 393; Cowden v. Pacific, etc., Co., 94 Cal. 470, s. c. 29 Pac. R. 873. See, also, ante, § 1467.

that some one else is given a lower rate. The authorities, however, are conflicting upon this subject, and many of them, hold that this is unjust discrimination of which an injured party has a right to complain. We shall refer to them hereafter, when we come to consider the subject of discrimination. It is said in an English case that, at common law, the question as to the reasonableness of freight charges is for the court,<sup>1</sup> but, however this may be when there is a question as to unjust discrimination or the violation of a statute by charging an unreasonable rate, we suppose that, where no such question is involved, the amount of compensation to which the carrier is entitled in any particular case is usually for the jury to determine. In such cases, if the rate has been fixed by a lawful contract, it must of course prevail,<sup>2</sup> and if the shipper has no other outlet and the carrier demands and forces him to pay a higher rate than that agreed upon, the shipper may nevertheless ship his goods and recover back the excess of freight above the contract price.<sup>3</sup> If there is no express contract, the law implies a contract to pay a reasonable compensation, which is usually determined by established usage,<sup>4</sup> or the amount commonly and customarily charged and paid for like services under like conditions.<sup>5</sup> "Further than that his

<sup>1</sup> *Gard v. Callard*, 6 M. & S. 69. See, also, *Dow v. Beidelman*, 125 U. S. 680, 2 Inters. Com. R. 56, s. c. 34 Am. & Eng. R. Cas. 322; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155.

<sup>2</sup> *Hutchinson on Carriers*, § 447. See *Smith v. Findley*, 34 Kan. 316; *Memphis, etc., Co. v. Abell*, (Ky.) 30 S. W. R. 658. In *Dillingham v. Labatt*, (Tex. Civ. App.) 30 S. W. R. 370, it was held that although the carrier had given a certain rate, which was not accepted, it could charge a higher rate which was allowed by law when the goods were shipped some time afterwards.

<sup>3</sup> *Chicago, etc., R. Co. v. Chicago, etc., Coal Co.*, 79 Ill. 121; *Louisville, etc., R. Co. v. Wilson*, 132 Ind. 517, s.

c. 32 N. E. R. 311; *West Virginia Transp. Co. v. Sweetzer*, 25 W. Va. 434; *Atchison, etc., R. Co. v. Miller*, 16 Neb. 661; *Baldwin v. Liverpool, etc., Steamship Co.*, 74 N. Y. 125.

<sup>4</sup> *London, etc., R. Co. v. Evershed*, L. R. 3 App. Cas. 1029; *Killmer v. New York, etc., R. Co.*, 100 N. Y. 395; *Newstadt v. Adams*, 5 Duer (N.Y.) 43.

<sup>5</sup> *Louisville, etc., R. Co. v. Wilson*, 119 Ind. 352, s. c. 21 N. E. R. 341, 4 L. R. A. 244; *Johnson v. Pensacola, etc., R. Co.*, 16 Fla. 623, s. c. 26 Am. R. 731; *London, etc., R. Co. v. Evershed*, L. R. 3 App. Cas. 1029. In an action to recover excessive charges paid by the shipper, evidence of the charges of other companies for similar services offered by the defendant, was

charges shall be reasonable," says a well known text-writer, "the common law seems to have put no restrictions upon the carrier in respect to his demand for compensation, and what is a reasonable charge can, of course, be fixed by no particular rule, but must be determined in every case as a question of fact by the same rules which apply to other cases of service performed, except that the extraordinary responsibility of the carrier for the safety of the goods must always, in such cases, be taken into consideration as an element of the service."<sup>1</sup>

§ 1561. **How compensation is calculated.**—It frequently happens that the bulk, weight, or quantity, or amount of the goods or things shipped will necessarily vary at different times, and it may be more or less, or greater or smaller, at the time and place of final delivery than it was at the time and place of shipment. How, then, is the compensation to be calculated or determined, especially when it is based upon the bulk or weight of the goods? It may, of course, be determined by contract, but where the contract simply fixes the rate at so much per hundred, or per ton, or the like, without specifying whether it is to be calculated upon the weight or measurement at the place of shipment or the place of delivery and without any provision as to leakage, shrinkage or evaporation on the one hand, or increase in bulk or weight on the other, it is evident that there is room for controversy. It is the general rule, as we have seen, that the carrier is entitled to freight only on what it carries and delivers, and the carrier ought, therefore, to provide against decrease in freight by reason of shrinkage, leakage, evaporation, decay, or the like, or, in the case of live stock, death from the inherent vice.<sup>2</sup> Although, in the absence

held inadmissible in the absence of a showing that the conditions were substantially the same. *Hopper v. Chicago, etc., R. Co.*, 91 Iowa 639, 60 N. W. R. 487. In *Canada, etc., R. Co., v. International Bridge Co.*, L. R. 8 App. Cas. 723, it was held that the question is not what profit may be reasonable for a railway company, but "what it is reasonable to charge the person who is charged." But see *Ames v. Union Pac. R. Co.*, 64 Fed. R. 165.

<sup>1</sup> *Hutchinson on Carriers*, (2nd ed.) § 447.

<sup>2</sup> See *Gibson v. Sturge*, 10 Exch. 622; *Shand v. Grant*, 15 Com. B. (N. S.) 324; *Allen v. Bates*, 1 Hilt. (N.

of such a provision, the carrier may lose freight from these causes, it can gain nothing from increase of bulk or weight after the goods are shipped, where there are no special stipulations upon the subject. Thus, it has been held in several cases, where grain and cotton had expanded and increased in bulk during the voyage, that the measurement or weight at the time of shipment must govern, and that, while the bulk or weight, at the destination might be "*prima facie* the criterion of the freight to be paid," when it is proved that the real quantity shipped was a different and smaller quantity, "the freight ought to be calculated upon the true quantity shipped."<sup>1</sup>

§ 1562. *Compensation pro rata itineris*.—If the consignee or owner of goods stops and reclaims them after their transportation has begun and before they have reached their destination, the carrier, being without fault, and ready, able and willing to carry them to their destination is entitled to full freight to the original point of destination,<sup>2</sup> unless it waives the same by a new contract, or the like. But there are cases in which it would be to the interest of both the owner and the carrier to stop the goods at some intermediate point, and for the one to pay and the other to accept a proportionate compensation. This frequently happens where there is an accident or something which prevents the carrier from transporting the goods to their destination itself without delay, although it might forward them over some other line in time. In such a case the carrier might receive no further benefit by forwarding them over another line, and the owner might find a better market

Y.) 221; Hutchinson on Carriers, § 454; Nine Thousand, etc., Dry Hides, 6 Ben. 199; The Andover, 3 Blatchf. (U. S. C. C.) 303; Boulton v. Ship Naval Reserve, 5 Hughes (U. S. C. C.) 233. But compare Barker v. Schooner E. M. Wright, 1 Mackey (U. S. C. C.) 24; Tio v. Vance, 11 La. 199, 30 Am. Dec. 715; The Cuba, 3 Ware 260.

<sup>1</sup>Gibson v. Sturge, 10 Exch. 622; Shand v. Grant, 15 Com. B. (N. S.) 324; Coulthurst v. Sweet, L. R. 1 C.

P. 649; Nine Thousand, etc., Dry Hides, 6 Ben. 199; Allen v. Bates, 1 Hilt. (N. Y.) 221.

<sup>2</sup>Scothorn v. South Staffordshire R. Co., 8 Exch. 341; Ellis v. Willard, 9 N. Y. 529; Hughes v. Sun Mut. Ins. Co., 100 N. Y. 58; Jordan v. Warren Ins. Co., 1 Story (U. S. C. C.) 342; Whitney v. Rogers, 2 Disney (Ohio) 421. As to deducting what it would have cost to earn it, see The Gazelle, 128 U. S. 474.



at the place of the accident, or elsewhere than at the original point of destination, or for some other reason might desire to take charge of them himself and relieve the carrier from further responsibility. They may, of course, make an express agreement to this effect and fix the amount of compensation to be paid for the services already performed; but, in the absence of an express contract, "if the owner thus voluntarily takes back the goods after a part of the service which the carrier undertook has been performed, the original contract of shipment is considered as abandoned by the agreement of the parties, and a new one is implied on the part of the shipper that he will pay the carrier a proportionate part of the freight, or as it is usually termed, *pro rata itineris*."<sup>1</sup> This rule is to be carefully applied, however, for the general rule is that if the bill of lading contains no provision for the payment of freight *pro rata itineris*, no freight is earned unless the transportation is completed and delivery is made, or ready to be made as specified,<sup>2</sup> and, in order to entitle the carrier to freight *pro rata itineris*, the acceptance of the goods by the owner or consignee, short of their destination, must be voluntary and under such circumstances as to give rise to the implication of a new contract.<sup>3</sup>

<sup>1</sup>Hutchinson on Carriers, § 455; note to Crawford v. Williams, 60 Am. Dec. 146, 153; Propeller Mohawk, 8 Wall. (U. S.) 153; Parsons v. Hardy, 14 Wend. (N. Y.) 215, s. c. 28 Am. Dec. 521; Luke v. Lyde, 2 Burr. 882; Hunt v. Haskell, 24 Me. 339, s. c. 41 Am. Dec. 387; Bennett v. Byram, 38 Miss. 17, s. c. 75 Am. Dec. 90; Forbes v. Rice, 2 Brev. (S. Car.) 363, s. c. 4 Am. Dec. 589; Gray v. Waln, 2 Serg. & R. (Pa.) 229.

<sup>2</sup>China, etc., Co. v. Force, 142 N. Y. 90; The Tornado, 108 U. S. 342, s. c. 2 Sup. Ct. R. 746; New York Cent., etc., R. Co. v. Standard Oil Co., 87 N. Y. 486; Knight v. Providence, etc., R. Co., 13 R. I. 572, s. c. 43 Am. R. 46; Adams v. Haught, 14 Tex. 243;

Bates v. White, 13 N. Y. St. R. 602; Angell on Carriers, § 400.

<sup>3</sup>Western Transp. Co. v. Hoyt, 69 N. Y. 230; Welch v. Hicks, 6 Cow. (N. Y.) 504, s. c. 16 Am. Dec. 443; Braithwaite v. Power, 1 N. Dak. 455, s. c. 48 N. W. R. 354; McGaw v. Ocean Ins. Co., 23 Pick. (Mass.) 405; Crawford v. Williams, 1 Sneed (Tenn.) 205, s. c. 60 Am. Dec. 146, and note; Columbian Ins. Co., v. Catlett, 12 Wheat. (U. S.) 383; Caze v. Baltimore Ins. Co., 7 Cranch (U. S.) 359; Merchants', etc., Ins. Co. v. Butler, 20 Md. 41; The Joseph Farwell, 31 Fed. R. 844. As to the effect of accepting proceeds of sale, see Vlietboom v. Chapman, 13 M. & W. 230; Escopiniche v. Stewart, 2 Conn. 391;

§ 1563. **Excessive and unreasonable charges.**—A railroad company, as a common carrier can not lawfully increase the charges for transportation by wrongfully diverting freight from its proper course in transit,<sup>1</sup> but, if the route which it adopts is a reasonable and proper one it may charge for the number of miles over which it carries the goods although there is a shorter route.<sup>2</sup> It has been held that it is not unreasonable for a railroad company to charge a lower rate for separate parcels directed to the same person than for similar parcels directed to different persons,<sup>3</sup> but a greater charge for the carriage of one package containing several parcels belonging to different persons than for the carriage of a package containing several parcels belonging to the same person is unreasonable and illegal under the English statute.<sup>4</sup> Where a carrier has agreed to carry a parcel at a certain rate without requiring its value to be stated, and the shipper is guilty of no wrong, it can not afterwards demand additional compensation upon finding that the value is greater than it supposed, and if it refuses to deliver the property without payment of an additional sum an action will lie for the amount so paid under duress of goods.<sup>5</sup> But it has been held that when, because of unexpected difficulties the shipper agrees to pay a sum in addition to what had previously been designated as the rate, he can not, after paying it, recover it back as paid without consideration.<sup>6</sup> A charge may be excessive because it is more than the rate fixed by contract, or is in violation of the interstate commerce law or the charter or other governing

*Richardson v. Young*, 38 Pa. St. 169;  
*Sampayo v. Salter*, 1 Mason (U. S. C. C.) 43; *Armroyd v. Union Ins. Co.*, 3 Binn. (Pa.) 437; *Hurtin v. Union Ins. Co.*, 1 Wash. (U. S. C. C.) 530.

<sup>1</sup> *Burlington, etc., R. Co. v. Chicago, etc., Co.*, 15 Neb. 390, s. c. 19 N. W. R. 451.

<sup>2</sup> *London, etc., R. Co. v. Myers*, 39 L. J. C. P. 57, s. c. 21 L. T. R. 460.

<sup>3</sup> *Baxendale v. Eastern Counties R. Co.*, 4 C. B. N. S. 63, s. c. 27 L. J. C. P. 137.

<sup>4</sup> *Crouch v. Great Northern R. Co.*, 11 Exch. 742, s. c. 25 L. J. Exch. 137. See, also, *Camblos v. Pennsylvania R. Co.*, 4 Brewst. (Pa.) 563.

<sup>5</sup> *Baldwin v. Liverpool, etc., R. Co.*, 74 N. Y. 125, s. c. 30 Am. R. 277. But see *Missouri, etc., R. Co. v. Trinity, etc., Co.*, 1 Tex. Civ. App. 553; *North German Lloyd v. Henle*, 44 Fed. R. 100, s. c. 10 L. R. A. 814.

<sup>6</sup> *Detroit, etc., R. Co. v. McKenzie*, 43 Mich. 609, s. c. 5 N. W. R. 1031.

statute, or, in the absence of a specific contract, because it is more than the customary and usual rate for like services under like conditions. If a railroad company receives goods and agrees to transport them through to their destination at a specified rate, it is liable for overcharges made and collected by its connecting carriers.<sup>1</sup> But no action lies against the last connecting carrier to recover back a charge which is not unreasonable, but is in excess of the rate agreed upon by the first carrier, in the absence of proof that the first carrier had authority to bind such connecting carrier by its contract rate of shipment.<sup>2</sup> So, where a shipper applied to the station agent of the initial carrier for a through rate over several distinct lines and such station agent made inquiry of the general freight agent of the intermediate carrier and received from him a through rate from the point where his company would receive the goods to the place of destination, it was held that, no matter what the effect of this was as between the two carriers, such intermediate carrier did not thereby become liable to the shipper for the overcharges of subsequent carriers.<sup>3</sup> It is no concern of the shipper how connecting carriers apportion among themselves the amount charged for through freight,<sup>4</sup> and if he is simply charged a reasonable rate, to which he agrees at the time of making his contract for the shipment of the goods, he can not complain of the action of the initial carrier in taking more than its share of the through rate in violation of its contract with its connecting carrier, or in charging more than had been agreed upon between the two carriers without sharing the profit with the connecting line.<sup>5</sup>

<sup>1</sup> Little Rock, etc., R. Co. v. Daniels, 49 Ark. 352, s. c. 5 S. W. R. 584, 32 Am. & Eng. R. Cas. 479; Detroit, etc., R. Co. v. McKenzie, 43 Mich. 609, s. c. 5 N. W. R. 1031, 9 Am. & Eng. R. Cas. 15; Parker v. Bristol, etc., R. Co., 6 Exch. 702.

<sup>2</sup> Mount Pleasant Mfg. Co. v. Cape Fear, etc., R. Co., 106 N. Car. 207, s. c. 10 S. E. R. 1046, 42 Am. & Eng. R. Cas. 498; Schneider v. Evans, 25

Wis. 241; Condict v. Grand Trunk R. Co., 4 Lans. (N. Y.) 106.

<sup>3</sup> Hill v. Burlington, etc., R. Co., 60 Iowa 196, s. c. 14 N. W. R. 249, 9 Am. & Eng. R. Cas. 21.

<sup>4</sup> Owen v. St. Louis, etc., R. Co., 83 Mo. 454, s. c. 25 Am. & Eng. R. Cas. 371.

<sup>5</sup> Arkansas, etc., R. Co. v. Smith, 53 Ark. 275, s. c. 13 S. W. R. 929, 42 Am. & Eng. R. Cas. 348.

§ 1564. **Rights and remedies where excessive charges are demanded.**—As a general rule, neither injunction nor mandamus will lie to prevent a carrier from making excessive charges or to compel it to transport goods at the rate fixed by law, where the complainant has an adequate remedy at law and is not specially injured;<sup>1</sup> but it has been held that injunction will lie to restrain a railroad company from entering into an agreement not to transport goods, which it is required to transport, at the rate fixed by law,<sup>2</sup> and there are many cases in which railroad companies, as *quasi* public corporations, have been compelled by these remedies to perform their duties as such without unjust discrimination.<sup>3</sup> The shipper usually, however, has other remedies. If he believes the charges to be unreasonable he may tender what he believes is reasonable compensation, at the time he offers his goods for transportation, and, if the carrier refuses to transport them for that sum, the shipper may bring an action for such refusal;<sup>4</sup> “or, if the price for the carriage is not demanded in advance, the owner may demand the goods after the carriage, tendering what he believes to be a reasonable compensation, and upon the carrier’s refusal to accept the tender and deliver the goods, he may sue him for them in trover or replevin; in which, however, he would fail if the issue as to reasonable compensation should be determined in favor of the carrier.”<sup>5</sup> So, the con-

<sup>1</sup> *Sutton v. Southeastern R. Co.*, 11 Am. L. Reg. (N. S.) 725, and note; *Jur. N. S.* 935, s. c. 35 L. J. Exch. 38; *State v. Mobile, etc., R. Co.*, 59 Ala. 321; *Rogers, etc., Works v. Erie, etc., R. Co.*, 20 N. J. Eq. 379; *Cumberland Valley R. Co.’s Appeal*, 62 Pa. St. 218. But compare *American Coal Co. v. Consolidation Coal Co.*, 46 Md. 15; *Wellington v. Norwich, etc., R. Co.*, 107 Mass. 582; *Attorney-General v. Chicago, etc., R. Co.*, 35 Wis. 425.

<sup>2</sup> *Rogers, etc., Works v. Erie, etc., R. Co.*, 20 N. J. Eq. 379.

<sup>3</sup> *Scofield v. Lake Shore, etc., R. Co.*, 43 Ohio St. 571, s. c. 54 Am. R. 846; *McCoy v. Cincinnati, etc., R. Co.*, 22

*Am. L. Reg. (N. S.)* 725, and note; *Twells v. Pennsylvania R. Co.*, (Pa.) 3 Am. L. Reg. (N. S.) 728; *International Exp. Co. v. Grand Trunk R. Co.*, 81 Me. 92; *Menacho v. Ward*, 27 Fed. R. 529; *Fargo v. Redfield*, 22 Fed. R. 373; *Texas Exp. Co. v. Texas, etc., R. Co.*, 6 Fed. R. 426; *State, ex rel, Atwater v. Delaware, etc., R. Co.*, 48 N. J. L. 55.

<sup>4</sup> *Carr v. Lancashire, etc., R. Co.*, 7 Exch. 707; *Hutchinson on Carriers*, (2d ed.) § 447a. See, also, *McDuffee v. Portland R. Co.*, 52 N. H. 430.

<sup>5</sup> *Hutchinson on Carriers*, (2d ed.) § 447a.

signee, or other proper party entitled to the goods, may obtain them by paying the charges exacted as a condition of their delivery, and then sue the carrier for the unlawful excess,<sup>1</sup> unless the payment was voluntarily made without compulsion or duress.<sup>2</sup> It is held in some jurisdictions that a protest is necessary,<sup>3</sup> but the weight of authority is to the effect that, as the parties are not on equal terms, and a protest would be idle, it is unnecessary where the owner is compelled to pay the charges demanded in order to get his goods carried, or to have them delivered to him and released from illegal restraint.<sup>4</sup> So, of course, where the payment is made under a mistake of fact, as, for instance, where it is supposed to be the true balance due on legal charges,<sup>5</sup> or is made in ignorance of

<sup>1</sup> *Parker v. Bristol, etc., R. Co.*, 6 Exch. 702; *Parker v. Great Western R. Co.*, 7 M. & G. 253; *Lancashire, etc., R. Co. v. Gidlow*, L. R. 7 H. L. Cas. 517, s. c. 32 L. T. R. 573; *Crouch v. London, etc., R. Co.*, 2 C. & K. 789; *Lafayette, etc. R. Co. v. Pattison*, 41 Ind. 312; *Chicago, etc., R. Co. v. Wolcott*, 141 Ind. 267, 39 N. E. R. 451; *Lake Erie, etc., R. Co. v. Condon*, 10 Ind. App. 536, s. c. 38 N. E. R. 71; *McGregor v. Erie R. Co.*, 35 N. J. L. 89; *Harmony v. Bingham*, 12 N. Y. 99; *Atchison, etc., R. Co. v. Miller*, 16 Neb. 661, s. c. 21 N. W. R. 451; *Memphis, etc., Co. v. Abell*, (Ky.) 30 S. W. R. 658; *Atchison, etc., R. Co. v. Goetz, etc., Co.*, 51 Ill. App. 151; *Galveston, etc., R. Co. v. Short*, (Tex. Civ. App.) 25 S. W. R. 142; *Seawell v. Kansas City, etc., R. Co.*, 119 Mo. 224, 9 Lewis' Am. R. & Corp. R. 606, and note. As to the statute of limitations, and when it begins to run, see *Carrier v. Chicago, etc., R. Co.*, 79 Iowa 80, s. c. 6 L. R. A. 799; note in 45 Am. & Eng. R. Cas. 299.

<sup>2</sup> *Killmer v. New York Cent., etc., R. Co.*, 100 N. Y. 395, s. c. 3 N. E. R. 293, 23 Am. & Eng. R. Cas. 659; *Arnold v. Georgia, R. etc., Co.*, 50 Ga.

304; *Lafayette, etc., R. Co. v. Pattison*, 41 Ind. 312, and see cases cited in the following note.

<sup>3</sup> *Evershed v. London, etc., R. Co.*, L. R. 3 Q. B. Div. 134; *London, etc., R. Co. v. Evershed*, L. R. 3 App. Cas. 1029; *Arnold v. Georgia, R. etc., Co.*, 50 Ga. 304; *Kenneth v. South Carolina R. Co.*, 15 Rich. (S. Car. Law) 284; *Potomac Coal Co. v. Cumberland, etc., R. Co.*, 38 Md. 226.

<sup>4</sup> *Heiserman v. Burlington, etc., R. Co.*, 63 Iowa 732, s. c. 16 Am. & Eng. R. Cas. 46, 18 N. W. R. 903; *Mobile, etc., R. Co. v. Steiner*, 61 Ala. 559; *West Virginia Trans. Co. v. Sweetzer*, 25 W. Va. 434, s. c. 22 Am. & Eng. R. Cas. 469; *Peters v. Marietta, etc., R. Co.*, 42 Ohio St. 275, s. c. 18 Am. & Eng. R. Cas. 492, 51 Am. R. 814; *Graham v. Chicago, etc., R. Co.*, 53 Wis. 473, s. c. 10 N. W. R. 609; *Louisville, etc., R. Co. v. Wilson*, 132 Ind. 517, s. c. 32 N. E. R. 311; *Chicago & A. R. Co. v. Chicago, etc., Coal Co.*, 79 Ill. 121; *Mount Pleasant, etc., Co. v. Cape Fear, etc., R. Co.*, 106 N. Car. 207, s. c. 42 Am. & Eng. R. Cas. 498.

<sup>5</sup> *Baltimore, etc., R. Co. v. Faunce*, 6 Gill (Md.) 68. See, also, *National Tube Works v. Baltimore, etc., R. Co.*,

the fact that rebates were allowed to others and upon the positive representations of the company that no rebates were allowed in any case,<sup>1</sup> the payment is not voluntary in such a sense as to prevent a recovery of the unlawful excess. We have considered this subject without reference to the interstate commerce law, for that is elsewhere treated, and we have stated the rules which govern in the absence of state legislation prohibiting unjust discrimination and providing new remedies or denouncing penalties for such discrimination and excessive charges. Most of the state statutes upon the subject prescribe a certain penalty to be recovered at the suit of the shipper or owner of the goods, and, in Kansas, it has been held that the statutory remedy is exclusive and abrogates the common law remedy for the recovery of excessive charges.<sup>2</sup> But in other states it has been held that, as the statutes confer no new rights, the remedies which they give are not exclusive of the common law remedy to recover for overcharges.<sup>3</sup>

**§ 1565. Discrimination—Rebates.**—As we have seen,<sup>4</sup> unjust discrimination in freight charges was not allowed at common law. It is also prohibited by statute in many states, and by the interstate commerce law, which is elsewhere considered. The subject of reasonable rates and unjust discrimination

(Pa.) 8 Atl. R. 6, 28 Am. & Eng. R. Cas. 13 (mistake as to distance).

<sup>1</sup> *Cook v. Chicago, etc., R. Co.*, 81 Iowa 551, s. c. 46 N. W. R. 1080, 3 Lewis' Am. R. & Corp. R. 550.

<sup>2</sup> *Beadle v. Kansas City, etc., R. Co.*, 51 Kan. 248, s. c. 32 Pac. R. 910. See, also, *Winsor Coal Co. v. Chicago, etc., R. Co.*, 52 Fed. R. 716.

<sup>3</sup> *Young v. Kansas City, etc., R. Co.*, 33 Mo. App. 509; *Murray v. Gulf, etc., R. Co.*, 63 Tex. 407, s. c. 22 Am. & Eng. R. Cas. 464; *Heiserman v. Burlington, etc., R. Co.*, 63 Iowa 732, s. c. 18 N. W. R. 903; *Fuller v. Chicago, etc., R. Co.*, 31 Iowa 187. But see, as to interstate commerce and the effect of the interstate commerce law,

*Swift v. Philadelphia, etc., R. Co.*, 58 Fed. R. 858, 64 Fed. R. 59 (with which compare *Murray v. Chicago, etc., R. Co.*, 62 Fed. R. 24); *Gatton v. Chicago, etc., R. Co.*, (Iowa) 63 N. W. R. 589. See, also, *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 667, s. c. 4 Sup. Ct. R. 185; *Chicago, etc., R. Co. v. Osborne*, 52 Fed. R. 912; *Wabash R. Co. v. Illinois*, 118 U. S. 557, s. c. 7 Sup. Ct. R. 4.

<sup>4</sup> *Ante*, § 1467. See, also, the elaborate notes in 9 Lewis' Am. R. & Corp. R. 273, *et seq.*, and 619, *et seq.*, in 8 Lewis' Am. R. & Corp. R. 700, *et seq.*, and in 11 Am. St. R. 647, as to what is unjust discrimination.

under the various state statutes has likewise been treated.<sup>1</sup> If there is no unjust discrimination an agreement by a railroad company that it will carry goods at a certain rate and repay the shipper a part thereof as a rebate after the shipment is not illegal, and the rebate may be recovered by the shipper in a proper case.<sup>2</sup> But the allowance of a rebate or drawback to a particular shipper may be an important matter to be considered with other circumstances as tending to show partiality and an unjust discrimination. Thus, it has even been held that the allowance of a rebate to favorite shippers from the regular schedule or tariff rates charged other customers generally for similar services under like conditions is sufficient to show an unjust discrimination which gives the customers against whom it is made a right to recover the amounts paid by them in excess of the rates charged the favorite shipper after deducting the rebate.<sup>3</sup> If the contract to pay a rebate is legal and valid the shipper may, as we have seen, recover for a breach thereof, but if there is unjust discrimina-

<sup>1</sup> *Ante*, § § 146, 1469.

<sup>2</sup> *Cleveland, etc., R. Co. v. Closser*, 126 Ind. 348, s. c. 26 N. E. R. 159, 9 L. R. A. 754, and note; *Bayles v. Kansas Pac. R. Co.*, 13 Colo. 181, s. c. 5 L. R. A. 480; *Kansas Pac. R. Co. v. Bayles*, 19 Colo. 348, 35 Pac. R. 744; *Christie v. Missouri Pac. R. Co.*, 94 Mo. 453, s. c. 7 S. W. R. 567; *Goodridge v. Union Pac. R. Co.*, 37 Fed. R. 182; *McNees v. Missouri Pac. R. Co.*, 22 Mo. App. 224; *Root v. Long Island R. Co.*, 114 N. Y. 300, s. c. 4 L. R. A. 331; *Ex parte, Benson*, 18 S. Car. 38, s. c. 44 Am. R. 564. Nor is it necessarily illegal because it is kept secret by the parties. *Hoover v. Pennsylvania R. Co.*, 156 Pa. St. 220, s. c. 27 Atl. R. 282, 9 Lewis' Am. R. & Corp. R. 252; *Borda v. Philadelphia, etc., R. Co.*, 141 Pa. St. 484, s. c. 21 Atl. R. 665.

<sup>3</sup> *Cook v. Chicago, etc., R. Co.*, 81 Iowa 551, s. c. 9 L. R. A. 764. But,

as we have elsewhere shown, there are many authorities which hold that it does not necessarily follow that a charge is unreasonable from the mere fact that another is charged less and that the charge is not necessarily unlawful at common law, unless it injures the complainant or has a tendency to foster a monopoly, or the like. See, however, *Messenger v. Pennsylvania R. Co.*, 36 N. J. L. 407, s. c. 37 N. J. L. 531 (distinguished and modified in *Stewart v. Lehigh Valley R. Co.*, 38 N. J. L. 505); *Sharpless v. Mayor*, 21 Pa. St. 147; *Audenried v. Philadelphia, etc., R. Co.*, 68 Pa. St. 370; *McDuffee v. Portland, etc., R. Co.*, 52 N. H. 430; *New England Ex. Co. v. Maine Cent. R. Co.*, 57 Me. 188; *Scofield v. Lake Shore, etc., R. Co.*, 43 Ohio St. 571, s. c. 3 N. E. R. 907; *Union Pac. R. Co. v. Goodridge*, 149 U. S. 680, s. c. 13 Sup. Ct. R. 970.

tion and the shipper is compelled to rely upon an illegal promise to pay as the gist of his action he can not recover the rebate from the carrier after paying the freight in full.<sup>1</sup> So, where the carrier's agent by mistake names a lower rate than that fixed in the schedule, and the contract based thereon is in violation of the interstate commerce law, such contract is void and the carrier is entitled to demand the proper schedule rate as a condition of the delivery of the goods.<sup>2</sup> The shipper can maintain no action against the carrier, in such a case, in which he is compelled to rely upon the illegal contract, and no matter whether the agent of a carrier gives an illegal rate by mistake or intentionally, the shipper can not enforce it against the connecting carrier which is not a party to the contract and receives and transports the goods without knowledge of any special agreement.<sup>3</sup>

§ 1566. **Compensation for special services.**—Charges for extra or special services in addition to those required in the transportation of goods are not necessarily excessive and unlawful even where the total amount charged the shipper is thus caused to exceed the maximum charges allowed by statute for the carriage in the usual manner. Thus, as we shall hereafter show, a railroad company may sometimes charge demurrage for the use of its cars. So, it may charge for terminal services rendered after the completion of the transportation,<sup>4</sup> or for services rendered in conveying property from its depot or regular place for receiving and delivering goods to an

<sup>1</sup> *Fitzgerald v. Grand Trunk R. Co.*, 63 Vt. 169, s. c. 13 L. R. A. 70, 22 Atl. R. 76; *Indianapolis, etc., R. Co. v. Davis*, 32 Ill. App. 67; *Indianapolis, etc., R. Co. v. Ervin*, 118 Ill. 250; *Hawley v. Kansas, etc., Co.*, 48 Kan. 593, s. c. 30 Pac. R. 14; *Parks v. Jacob Dold, etc., Co.*, 27 N. Y. Supp. 289. See, also, *Hancock v. Louisville, etc., R. Co.*, 145 U. S. 409, s. c. 12 Sup. Ct. R. 969. As to the effect of the interstate commerce law on existing contracts for rebates, see *Bullard v. North-*

*ern Pac. R. Co.*, 10 Mont. 168, s. c. 11 L. R. A. 246. See, also, *Merchants' Cotton Press Co. v. Insurance Co. of North America*, 151 U. S. 368, s. c. 14 Sup. Ct. R. 367.

<sup>2</sup> *Savannah, etc., R. Co. v. Bundick*, 94 Ga. 775, s. c. 21 S. E. R. 995.

<sup>3</sup> *Chicago, etc., R. Co. v. Hubbell*, 54 Kan. 232, s. c. 38 Pac. R. 266.

<sup>4</sup> *Ante*, § 1551; *National Tube Works Co. v. Baltimore, etc., R. Co.*, (Pa.) 8 Atl. R. 6, s. c. 28 Am. & Eng. R. Cas. 13.



elevator<sup>1</sup> and the like,<sup>2</sup> or for furnishing food necessary for live stock where it is the owner's duty to furnish it and he fails to do so.<sup>3</sup> But extra charges can not be made under ordinary circumstances for furnishing proper station accommodations, weighing, checking, loading and unloading goods, or the like, as these things are usually incidents of the carriage and come within the ordinary duty of the carrier as such.<sup>4</sup> It is somewhat difficult to formulate a general rule upon the subject, but we suppose that if the services are such as are customarily rendered as part of the transportation itself, or as properly incident thereto, no more than the maximum rate allowed by statute can be demanded, and a charge of more than is customarily charged others for like services under like conditions would be unreasonable and excessive, while for services which can not be deemed part of the transportation itself, or are not such as are usually rendered in transporting and delivering goods, a reasonable charge may be made in addition to the statutory or customary rate for the mere transportation itself. It has been held that for a special service, such as the transportation of perishable goods by fast freight, requiring the cars to be specially fitted up for that purpose, their withdrawal from other service, their return empty on fast time and un-

<sup>1</sup> *Owen v. St. Louis, etc., R. Co.*, 83 Mo. 454, s. c. 25 Am. & Eng. R. Cas. 371. See, also, *Providence Coal Co. v. Providence, etc., R. Co.*, 15 R. I. 303, 26 Am. & Eng. R. Cas. 42.

<sup>2</sup> See *Johnson v. Cayuga, etc., R. Co.*, 11 Barb. (N. Y.) 621; *Pryce v. Monmouthshire R. Co.*, 49 L. J. Exch. 130, s. c. L. R. 4 App. Cas. 197; *Dunkirk Colliery Co. v. Manchester, etc., R. Co.*, 2 Nev. & Mac. 402; *Monmouthshire B. Co. v. Williams*, 27 L. T. R. 134; *London, etc., R. Co. v. Price*, L. R. 11 Q. B. Div. 485, s. c. 52 L. J. Q. B. Div. 754.

<sup>3</sup> *Great Northern R. Co. v. Swaffield*, 43 L. J. Exch. 89, s. c. L. R. 9 Exch. 132. See, also, *Story on Bailments*, 586.

<sup>4</sup> *Hall v. London, etc., R. Co.*, L. R., 15 Q. B. Div. 505, s. c. 22 Am. & Eng. R. Cas. 446; *Pegler v. Monmouthshire R. Co.*, 6 H. & N. 644, s. c. 30 L. J. Exch. 249. See, also, *Lancashire, etc., R. Co. v. Gidlow*, L. R., 7 H. L. Cas. 517, s. c. 32 L. T. 573; *Burlington, etc., R. Co. v. Chicago, etc., Co.*, 15 Neb. 390, s. c. 19 N. W. R. 451; *Neston Colliery Co. v. London, etc., R. Co.*, 4 R. Canal Tr. Cas. 257. Where contract for special rate was void, it was held that carrier might collect usual rate. *Chicago, etc., R. Co. v. Hubbell*, 54 Kan. 232, 38 Pac. 266. See, also, *Savannah, etc., R. Co. v. Bundred*, 94 Ga. 775, 21 S. E. R. 995.

usually prompt delivery of the goods at their destination, a carrier may charge a higher rate than that for the carriage of ordinary freight.<sup>1</sup> So, it has been held that a miller whose flour is taken directly from his mill into the cars of the carrier can not complain that the carrier bears a portion of the expense of cartage of other millers in the same city whose flour has to be carted to the cars of the carrier.<sup>2</sup>

§1567. **Demurrage.**—It has been said that the right to demurrage exists only in maritime law and is confined to carriers by water.<sup>3</sup> But, while it is probably true that this right is derived by analogy from the maritime law as administered in America,<sup>4</sup> the more recent authorities have almost unanimously upheld the right of railroad companies to make demurrage charges in proper cases. As said by one of the courts, “we see no satisfactory reason why carriers by railroads should not be entitled to compensation for the unreasonable delay or detention of their vehicles as well as carriers by sea.”<sup>5</sup> After a carrier has completed its services as such, it has a right to charge extra compensation for storing the goods in a warehouse and keeping them after the consignee has had a reasonable time in which to remove them.<sup>6</sup> Why, then, when its duties as a carrier have been performed, and a reasonable time has elapsed, is it not as much entitled to additional compensation

<sup>1</sup> Delaware State Grange, etc., v. Lumber Co., 15 Neb. 390, s. c. 19 N. York Cent., etc., R. Co., 3 Interstate Com. R. 554. See, also, Loud v. South Carolina R. Co., 4 Interstate Com. R. 205; Burton Stock Car Co. v. Chicago, etc., R. Co., 1 Interstate Com. R. 329.

<sup>2</sup> Macloon v. Chicago, etc., R. Co., 3 Interstate Com. R. 711; Hezel Milling Co. v. St. Louis, etc., R. Co., 3 Interstate Com. R. 701. See, also, Chicago, etc., R. Co. v. People, 67 Ill. 11, s. c. 16 Am. R. 599; Dunkirk Colliery Co. v. Manchester, etc., R. Co., 2 Nev. & Mac. 402; Savitz v. Ohio, etc., R. Co., 150 Ill. 208, 37 N. E. R. 235.

<sup>3</sup> Burlington, etc., R. Co. v. Chicago

Lumber Co., 15 Neb. 390, s. c. 19 N. W. R. 451; Chicago, etc., R. Co. v. Jenkins, 103 Ill. 588; Hutchinson on Carriers, (2d ed.) § 473a. See, also, Crommelin v. New York, etc., R. Co., 4 Keyes (N. Y.) 90.

<sup>4</sup> In England, it has been said, no such right exists even under the maritime law in the absence of any contract for damages. See note in 22 L. R. A. 530.

<sup>5</sup> Miller v. Georgia R. etc., Co., 88 Ga. 563, s. c. 15 S. E. R. 316, 50 Am. & Eng. R. Cas. 79, 18 L. R. A. 323.

<sup>6</sup> Hutchinson on Carriers, (2d ed.) § 378.

for the use of its cars and tracks as for the use of its warehouse. Certainly a customer whose duty it is to unload or who unreasonably delays the unloading of a car for his own benefit ought not to complain if he is made to pay a reasonable sum for the unreasonably delay caused by his own act. But this is not all. The public interests also require that cars should not be unreasonably detained in this way. Railroad companies as common carriers are "bound to furnish cars for transportation of freight, and they must have control over their cars in order to perform their duties to the public. A car in motion is a useful thing, but a car standing idle and unloaded on the track is useless, and an incumbrance. If A. be allowed to hold a car unloaded (or loaded) at his pleasure or convenience, without cost or charge, and thus deprive the railroad company of the use of its vehicles for transportation of the freight of B. it is obvious that both the railroad company and the public will suffer injury."<sup>1</sup> It is also well settled that common carriers may make reasonable rules and regulations for the convenient

<sup>1</sup> Per Fautleroy, J., in *Norfolk, etc., R. Co. v. Adams*, 90 Va. 393, s. c. 18 S. E. R. 673, 22 L. R. A. 530. In the case of *Miller v. Georgia R. etc., Co.*, 88 Ga. 563, s. c. 15 S. E. R. 316, 50 Am. & Eng. R. Cas. 79, the court said: "The law compels the carrier to receive the goods of the public, and to transport and deliver them within a reasonable time. \* \* \* To do this it is necessary that the means of transportation shall be under the carriers' control, and that after the duty of carriage has been performed its vehicles shall not be converted into storehouses, at the will of consignees, to remain such indefinitely and without compensation. If no check could be placed on such detention, it is plain that the business of transportation would be at the mercy of private interest or caprice, and that carriers thus hampered in their facilities, and unable to

foresee the time or extent to which their vehicles would be diverted from the work of carriage, could not provide properly for the demands of traffic, or perform with dispatch their legitimate function. It would place upon the carrier the burden and expense of supplying numerous vehicles not needed for the hauling of freights, thus requiring it to provide extra facilities as well as to render extra service, without compensation beyond that received for transportation. It would result in the accumulation of cars on the carriers' tracks, and the obstruction in a greater or less degree of the movement and unloading of trains. Not only would loss ensue to the carrier, but consignees and shippers in general and the people at large must suffer seriously from this hindrance to the due and regular course of transportation."

transaction of their business. It follows, from this line of reasoning, that railroad companies may adopt and enforce general rules, which are, or ought to be, known to their customers, making a reasonable charge for the unreasonable detention of their cars.<sup>1</sup> In a number of cases a charge of one dollar a day for the detention of a car after the lapse of forty-eight hours, Sundays and legal holidays excepted, has been held not to be unreasonable as a matter of law.<sup>2</sup> So, a charge of two dollars a day, after the lapse of twenty-four hours has been enforced where the customer knew of the rule at the time the shipment was made.<sup>3</sup> Where corn was shipped to a way-station, subject to the shipper's order, and he allowed it to remain there until he sold it, knowing that the person he had expected to receive and pay for it could not do so and that he was expected to pay a dollar a day for the use of the car while the corn was in it, the court held that he could not recover such demurrage which he had been compelled to pay either upon the ground that it was an "overcharge in freight," or "money paid in excess of what was due the defendant for services rendered."<sup>4</sup> So where a statute forbade railroad companies to charge or receive any fee

<sup>1</sup> *Miller v. Georgia R., etc., Co.*, 88 Ga. 563, s. c. 15 S. E. R. 316, 18 L. R. A. 323, 50 Am. & Eng. R. Cas. 79, and note quoting from *Union Pac. R. Co. v. Cooke*, Dist. Ct. of Arapahoe Co., Col., April, 1892, and *Kentucky Wagon, etc., Co. v. Louisville, etc., R. Co.*, Law & Eq. Ct., of Louisville, Ky., Dec. 20, 1891; *Norfolk, etc., R. Co. v. Adams*, 90 Va. 393, s. c. 18 S. E. R. 673, 22 L. R. A. 530, and note citing *Ohio, etc., R. Co. v. Bannon*, Common Pleas Ct. of Louisville, Ky., June 20, 1892; *Chicago, etc., R. Co. v. Pioneer Fuel Co.*, Dist. Ct. of Woodbury Co., Iowa, January, 1892; *Milwaukee, etc., R. Co. v. Lynch*, Circuit Ct. of Oneida Co., Wisconsin, October 15, 1892, and *Goff v. Old Colony R. Co.*, Sixth Dist. Ct. of Rhode Island, January 19, 1893; *Ken-*

*tucky Wagon, etc., Co. v. Ohio, etc., R. Co.*, (Ky.) 32 S. W. R. 595, s. c. 12 *Lewis' Am. R. & Corp. R.* 48; *Griffith v. Kansas City, etc., R. Co.*, Circuit Ct. of Jackson Co., Mo., February, 1896; *Kansas Pac. R. Co. v. McCann*, 2 *Wyom.* 3.

<sup>2</sup> *Kentucky Wagon, etc., Co. v. Ohio, etc., R. Co.*, (Ky.) 32 S. W. R. 595, s. c. 12 *Lewis' Am. R. & Corp. R.* 48; *Miller v. Georgia R. etc., Co.*, 88 Ga. 563, s. c. 15 S. E. R. 316, 50 Am. & Eng. R. Cas. 79, and note. See, also, reports of railroad commissioners referred to in note in 22 L. R. A. 532.

<sup>3</sup> *Miller v. Mansfield*, 112 Mass. 260; *Union Pac., etc., R. Co. v. Cooke*, Dist. Ct. of Arapahoe Co., Colorado, March 25, 1892.

<sup>4</sup> *Hunt v. Missouri, etc., R. Co.*, (Tex. Civ. App.) 31 S. W. R. 523.

or commission for transportation, storage or delivery other than the regular transportation fees, storage and other charges authorized by law for manifesting, receiving or shipping, it was held that a rule imposing a charge of one dollar a day for the detention of a car, after notice to the consignee of its arrival and the lapse of seventy-two hours, was not unreasonable or in violation of the statute.<sup>1</sup> The court said that such charge was not for transportation, storage or delivery, but was for the use and occupation of the cars and the obstruction of the track by the consignees for an unreasonable time after the contract for transporting and delivering the freight had been fulfilled. Where a shipper consigned a certain number of car loads of grain to himself at a station on a connecting line, and the grain in transit was transferred from the cars of the initial carrier to the cars of the connecting line, a notice by the carrier to the shipper of the arrival of the number of cars of grain consigned, in its cars bearing certain numbers, was held sufficient notice to render him liable for demurrage on his failure to unload it within proper time after arrival, without stating in what cars it was originally shipped or into what particular cars it had been transferred.<sup>2</sup> It was held in the cases cited in the first note to this section that a railroad company can have no lien for demurrage charges, but, as we have seen, those cases deny *in toto* the right to charge for delay or detention of cars, in the absence of a contract, and, to that extent at least, are contrary to the weight of authority. In several of the cases which assert the right to charge demurrage it is expressly held that the company may have a lien for such charges, and in others there are intimations to the same effect.<sup>3</sup>

<sup>1</sup> *Norfolk, etc., R. Co. v. Adams*, 90 Va. 393, s. c. 18 S. E. R. 673, 22 L. R. A. 530.

<sup>2</sup> *Galveston, etc., R. Co. v. Hunt*, (Tex. Civ. App.) 32 S. W. R. 549.

<sup>3</sup> *Griffith v. Kansas City, etc., R. Co.*, decided by the Circuit Court of Jackson Co., Missouri, February, 1896; *Miller v. Mansfield*, 112 Mass. 260; *Groff v. Old Colony R. Co.*, Sixth Dist.

*Ct. of Rhode Isand*, January 19, 1893; *Kentucky Wagon, etc., Co. v. Ohio, etc., R. Co.*, (Ky.) 32 S. W. R. 595, s. c. 12 Lewis' Am. R. & Corp. R. 48, 54. See, also, *Barker v. Brown*, 138 Mass. 340; *Schmidt v. Blood*, 9 Wend. (N. Y.) 268, 24 Am. Dec. 143, 148, and note; *Steinman v. Wilkins*, 7 W. & S. (Pa.) 466, 42 Am. Dec. 254, and note; *Alden v. Carver*, 13 Iowa 253.

§ 1568. **Car service associations.**—Where there are connecting carriers it is frequently more convenient both for them and for their customers to enforce demurrage charges by means of “Car Service Associations.” Such associations are usually formed by the voluntary act of the different companies each of which usually has a representative upon the executive committee, and the rules adopted by the association in regard to demurrage charges are accepted by them and become their own rules. “That there may be a reasonable charge for the detention of the carrier’s cars by the consignee or consignor beyond a reasonable time within which to load and unload them can not now be doubted, and that such charges may be imposed and enforced through what are known over the country as ‘Car Service Associations,’ is equally well settled.”<sup>1</sup> Such associations, formed for the purpose of making and enforcing reasonable regulations to facilitate business and secure the prompt loading, unloading and return of cars, can not be held illegal upon the ground that the constituent companies by becoming members surrender their corporate functions and control to the associations, nor upon the ground that, under the rules adopted, one of the members is authorized to collect charges on cars that belong to other members, nor because imposing and enforcing charges for detention through the association, involves, in effect at least, an agreement by the different members to make their charges uniform.<sup>2</sup>

§ 1569. **Collecting charges.**—**Connecting carriers.**—We have already seen that a carrier may require the payment of freight in advance, but that if it fails to do so and there is no contract to pay before delivery, it can not, as a general rule, maintain an action for the freight until it has delivered or properly offered to deliver the goods. A demand, by mistake, of more

But compare *East Tenn., etc., R. Co. v. Hunt*, 15 Lea (Tenn.) 261.

<sup>1</sup> *Kentucky Wagon, etc., Co. v. Ohio, etc., R. Co., (Ky.)* 32 S. W. R. 595, s. c. 12 *Lewis’ Am. R. & Corp.* R. 48.

<sup>2</sup> *Kentucky Wagon, etc., Co. v. Ohio, etc., R. Co., (Ky.)* 32 S. W. R. 595, s. c. 12 *Lewis’ Am. R. & Corp.* R. 48.

than is due is no defense to an action for what is due and does not waive a tender of the proper amount.<sup>1</sup> But it has been held that a carrier, by limiting its claim to services performed between certain dates, may make those dates material so as to prevent a recovery in such action for services performed before or after the time designated.<sup>2</sup> The carrier usually, however, enforces the payment of freight or collects it by holding and selling the goods, if necessary, by virtue of its lien, of which we shall treat in the next section. As a general rule the consignor, whether the owner or the agent of the owner of the goods, is regarded as having authority to agree to the terms of transportation,<sup>3</sup> and a carrier receiving goods for transportation beyond its own line has the implied authority, in the absence of anything to the contrary, to select any of the usual routes, and is regarded as the forwarding agent of the owner, so that a subsequent independent connecting carrier, receiving the goods in the usual and ordinary course of business, without notice of any special agreement with the initial carrier, is entitled to demand the ordinary and usual freight for its services in transporting them to their destination.<sup>4</sup> It has also been held that it may require prepayment of the freight,<sup>5</sup> and is entitled to a lien not only for its own charges but also for freight properly paid by it to the preceding carrier.<sup>6</sup> But

<sup>1</sup> *Loewenberg v. Arkansas, etc., R. Co.*, 56 Ark. 439, s. c. 19 S. W. R. 1051.

<sup>2</sup> *Manchester, etc., R. Co. v. Fisk*, 33 N. H. 297.

<sup>3</sup> *Ryan v. Missouri, etc., R. Co.*, 65 Tex. 13, s. c. 23 Am. & Eng. R. Cas. 703; *Hutchinson on Carriers*, § 265; *ante*, §§ 1408, 1507.

<sup>4</sup> *Price v. Denver, etc., R. Co.*, 12 Colo. 402, s. c. 21 Pac. R. 188; *Patten v. Union Pac. R. Co.*, 29 Fed. R. 590; *Missouri, etc., R. Co. v. Stoner*, 5 Tex. Civ. App. 50, s. c. 23 S. W. R. 1020; *Schneider v. Evans*, 25 Wis. 241. See, also, *Wolf v. Hough*, 22 Kan. 659; *Crossan v. New York, etc., R. Co.*,

149 Mass. 196; *ante*, § 1451, where numerous authorities are cited.

<sup>5</sup> *Randall v. Richmond, etc., R. Co.*, 108 N. Car. 612, s. c. 49 Am. & Eng. R. Cas. 74; *ante*, § 1558.

<sup>6</sup> *Potts v. New York, etc., R. Co.*, 131 Mass. 455, s. c. 41 Am. R. 247; *Moore v. Henry*, 18 Mo. App. 35; *Briggs v. Boston, etc., R. Co.*, 6 Allen (Mass.) 246; *Bird v. Georgia, etc., R. Co.*, 72 Ga. 655, s. c. 27 Am. & Eng. R. Cas. 39; *Knight v. Providence, etc., R. Co.*, 13 R. I. 572, s. c. 9 Am. & Eng. R. Cas. 90; *Moses v. Port Townsend, etc., R. Co.*, 5 Wash. St. 595, s. c. 32 Pac. R. 488, 1000. See, also, *ante*, § 1451.

it has been held that although goods are shipped under a special contract as to charges without notice to the connecting carrier, and the waybill shows charges in excess of the contract rate, if the connecting carrier, without paying such charges, carries the goods to their destination but refuses to deliver them on tender of the contract price, which exceeds the amount due it, such connecting carrier is liable for damages sustained by the consignee by its failure to deliver after having a reasonable time to ascertain the facts about the special contract.<sup>1</sup> If the initial carrier agrees to transport goods to their destination beyond its own line at a guaranteed rate and the connecting carriers charge the shipper a higher rate the initial carrier is liable to him for the excess.<sup>2</sup> It is not unusual for the last carrier, as agent for the first, to collect the freight due the first carrier as well as its own.<sup>3</sup>

§ 1570. **Carrier's lien for freight.**—It is well settled that a carrier is entitled to a lien upon the goods transported by it to secure the freight which is justly due for their transportation. Speaking generally, this lien is co-extensive with the right to recover freight.<sup>4</sup> It is a specific and not a general lien, that is, it is confined to charges and advances upon the particular goods<sup>5</sup> for, or incident to, their transportation.<sup>6</sup> The carrier has no general lien, in the absence of a contract, statute or governing custom to that effect, upon goods transported by it,

<sup>1</sup> *Illinois Cent. R. Co. v. Brookhaven, etc., Co.*, 71 Miss. 663, s. c. 16 So. R. 252. See, also, *Evansville, etc., R. Co. v. Marsh*, 57 Ind. 505.

<sup>2</sup> *Detroit, etc., R. Co., v. McKenzie*, 43 Mich. 609, s. c. 9 Am. & Eng. R. Cas. 15; *Little Rock, etc., R. Co. v. Daniels*, 49 Ark. 352, s. c. 32 Am. & Eng. R. Cas. 479.

<sup>3</sup> *Trottier v. Red River, etc., Co., Manitoba (T. Wood)* 255.

<sup>4</sup> *Ewart v. Kerr, Rice L. (S. Car.)* 203; *Hall v. Dimond*, 63 N. H. 565; *Dyer v. Grand Trunk R. Co.*, 42 Vt. 441.

<sup>5</sup> *Bacharach v. Chester Freight Line*, 133 Pa. St. 414, s. c. 19 Atl. R. 409; *Pennsylvania R. Co. v. American Oil Works*, 126 Pa. St. 485; *Pharr v. Collins*, 35 La. Ann. 939, s. c. 48 Am. R. 251.

<sup>6</sup> *Miller v. Mansfield*, 112 Mass. 260; *Steamboat Virginia v. Kraft*, 25 Mo. 76; *Illinois Cent. R. Co. v. Alexander*, 20 Ill. 23; *Culbreth v. Philadelphia, etc., R. Co.*, 3 Houst. (Del.) 392; *Lambert v. Robinson*, 1 Esp. 119; *Kinnear v. Midland R. Co.*, 19 L. T. N. S. 387.



for a general balance of account or freight due it upon other goods previously transported.<sup>1</sup> But, as we have seen, the carrier's lien may include the charges of a prior connecting carrier.<sup>2</sup> So, import duties paid by the carrier may be included,<sup>3</sup> and a more comprehensive lien than that which existed at common law is provided for by statute in many of the states.<sup>4</sup> But a connecting carrier which receives goods with notice that the freight has been paid in advance for through transportation, or that the goods have been wrongfully diverted to its route is not entitled to a lien for charges.<sup>5</sup> So, as against the true owner who is no way in fault, a carrier acquires no right to a lien for charges upon the goods which it carries for one who wrongfully has possession of them and has no authority to direct their shipment.<sup>6</sup> But where there is no question of this kind and the carrier is entitled to a lien, such lien is superior to the owner's right of stoppage *in transitu* and he

<sup>1</sup> Rushforth v. Hadfield, 6 East 519; Butler v. Woolcott, 2 B. & P. N. R. 64; Leonard's Exrs. v. Winslow, 2 Grant (Pa.) 139; Bacharach v. Chester Freight Line, 133 Pa. St. 414, s. c. 19 Atl. R. 409; McFarland v. Wheeler, 26 Wend. (N. Y.) 467; note in 42 Am. & Eng. R. Cas. 364.

<sup>2</sup> *Ante*, §§ 1451, 1569. See, also, Bisel v. Price, 16 Ill. 408, 413; Vaughan v. Providence, etc., R. Co., 13 R. I. 578; Wells v. Thomas, 27 Mo. 17; Georgia R. Co. v. Murrah, 85 Ga. 343, s. c. 11 S. E. R. 779.

<sup>3</sup> Guesnard v. Louisville, etc., R. Co., 76 Ala. 453, s. c. 23 Am. & Eng. R. Cas. 691; Dennie v. Harris, 9 Pick. (Mass.) 364; Harris v. Dennie, 3 Peters (U. S.) 292. See Cleveland, etc., R. Co. v. McClung, 119 U. S. 454, s. c. 28 Am. & Eng. R. Cas. 70; Wyman v. Lancaster, 32 Fed. R. 720.

<sup>4</sup> See 13 Am. & Eng. Ency. of Law, 580.

<sup>5</sup> Marsh v. Union Pac. R. Co., 9 Fed. R. 873, s. c. 6 Am. & Eng. R. Cas. 359; Travis v. Thompson, 37

Barb. (N. Y.) 236; Bird v. Georgia, etc., R. Co., 72 Ga. 655, s. c. 27 Am. & Eng. R. Cas. 39; Denver, etc., R. Co. v. Hill, 13 Colo. 35, s. c. 4 L. R. A. 376. But compare Wolf v. Hough, 22 Kan. 659; Crossan v. New York, etc., R. Co., 149 Mass. 196, s. c. 40 Am. & Eng. R. Cas. 136, and note. See *ante*, § 1451.

<sup>6</sup> Stevens v. Boston, etc., R. Co., 8 Gray (Mass.) 262; Robinson v. Baker, 5 Cush. (Mass.) 137; Gibson v. Gwinn, 107 Mass. 126; Pingree v. Detroit, etc., R. Co., 66 Mich. 143, s. c. 33 N. W. R. 298; Kohn v. Richmond, etc., R. Co., 37 S. Car. 1; Travis v. Thompson, 37 Barb. (N. Y.) 236; Collman v. Collins, 2 Hall (N. Y.) 569; Vaughan v. Providence, etc., R. Co., 13 R. I. 578, s. c. 9 Am. & Eng. R. Cas. 41; Ames v. Palmer, 42 Me. 197; *ante*, § 1451. But the rule seems to be otherwise in England. Hutchinson on Carriers, (2d ed.) § 489, *et seq.*; Redman's Law of Railway Carriers, (2d ed.) 84.

must pay the carrier's charges on the particular goods before he is entitled to their possession,<sup>1</sup> although the goods can not be held by the carrier to compel him to pay a general balance due it from the consignee.<sup>2</sup> The lien of a carrier and warehouseman for transporting and keeping goods is also superior to that of a pledgee who procured such transportation and storage.<sup>3</sup> But the fact that the carrier has a superior lien and may detain the goods, does not give it the right to injure or abandon them, and it is bound to take reasonable measures for their preservation and protection while it detains them for its charges.<sup>4</sup>

§ 1571. **Enforcement of lien.**—If the freight is not paid within a reasonable time after the arrival of the goods at their destination, the carrier, having performed its part of the contract of carriage and being ready to deliver upon payment of the carriage, may store the goods with a responsible warehouseman, either in the name of the owner, subject to its lien, or in its own name,<sup>5</sup> and such warehouseman will hold them as the representative of the carrier for the purpose of preserving its lien.<sup>6</sup> The carrier may proceed in equity to obtain a

<sup>1</sup> *Potts v. New York, etc., R. Co.*, 131 Mass. 455, s. c. 3 Am. & Eng. R. Cas. 424; *Pennsylvania Steel Co. v. Georgia, R. etc., Co.*, 94 Ga. 636, s. c. 21 S. E. R. 577; *Raymond v. Tyson*, 17 How. (U. S.) 53; *Chandler v. Belden*, 18 Johns. (N. Y.) 157; *Benjamin on Sales*, § 836. See, also, *Rucker v. Donovan*, 13 Kan. 251, s. c. 19 Am. R. 84, holding that such lien takes precedence of any claims against the owner or consignee of goods.

<sup>2</sup> *Oppenheim v. Russell*, 3 B. & P. 42; *Jackson v. Nichol*, 5 Bing. N. Cas. 508; *Farrell v. Richmond, etc., R. Co.*, 102 N. Car. 390, s. c. 3 L. R. A. 647; *Pennsylvania R. Co. v. American Oil Works*, 126 Pa. St. 485. See, also, *Mercantile, etc., Bank v. Gladstone*, L. R. 3 Exch. 233.

<sup>3</sup> *Cooley v. Minnesota Transfer R. Co.*, 53 Minn. 327, s. c. 55 N. W. R. 141.

<sup>4</sup> *St. Louis, etc., R. Co. v. Flanagan*, 23 Ill. App. 489; *Scarf v. Morgan*, 4 M. & W. 270; *Georgia, R. Co. v. Murrah*, 85 Ga. 343, s. c. 11 S. E. R. 779, (not liable if they are lost or destroyed without fault or negligence on its part).

<sup>5</sup> *Western Transp. Co. v. Barber*, 56 N. Y. 544; *Gregg v. Illinois Cent. R. Co.*, 147 Ill. 550, s. c. 35 N. E. R. 343; *Hall v. Dimond*, 63 N. H. 565, s. c. 3 Atl. R. 423. Safer, perhaps, in its own name.

<sup>6</sup> *Alden v. Carver*, 13 Iowa 253; *The Eddy*, 5 Wall (U. S.) 481; *Brittan v. Barnaby*, 21 How. (U. S.) 527; *Western Transp. v. Barber*, 56 N. Y. 544; *Compton v. Shaw*, 1 Hun (N. Y.) 441; *Indianapolis, etc., R. Co. v. Herndon*,

judicial decree for their sale to satisfy its lien,<sup>1</sup> but it can not, in the absence of statutory authority, proceed to sell them without a judicial decree,<sup>2</sup> except, perhaps, in case of necessity. There are, however, statutes in many of the states providing for the sale of goods to satisfy the lien of the carrier without resorting to the courts.<sup>3</sup> The provisions of the governing statute should be carefully followed in such a case and the sale fairly conducted.<sup>4</sup> So, where the goods are of a perishable character and the consignee will not accept them,<sup>5</sup> or there are other reasons requiring a sale without delay, the carrier may be justified in selling the goods because of the necessity in the particular case.<sup>6</sup> The carrier is not, however, confined to its lien for the collection of its charges. It may maintain an action at law to recover them, in a proper case, even if it has waived its lien.<sup>7</sup>

§ 1572. **Waiver and loss of lien.**—The lien of the carrier is lost by an unconditional delivery or voluntary surrender of the goods upon which it was held.<sup>8</sup> But there may be a con-

81 Ill. 143; *Gregg v. Illinois Cent. R.* 147 Ill. 550, s. c. 35 N. E. R. 343.

<sup>1</sup> *Crass v. Memphis, etc., R. Co.*, 96 Ala. 447, s. c. 11 So. R. 480, 55 Am. & Eng. R. Cas. 659. See, also, *Indianapolis, etc., R. Co. v. Herndon*, 81 Ill. 143; *Westmoreland v. Foster*, 60 Ala. 448; *Rankin v. Memphis, etc., Packet Co.*, 9 Heisk. (Tenn.) 564, s. c. 24 Am. R. 339; *Saltus v. Everett*, 20 Wend. (N. Y.) 267, s. c. 32 Am. Dec. 541.

<sup>2</sup> *Myers v. Baymore*, 10 Pa. St. 114, s. c. 49 Am. Dec. 586; *Fox v. McGregor*, 11 Barb. (N. Y.) 41; *Hall v. Ocean Ins. Co.*, 37 Fed. R. 371; *Hunt v. Haskell*, 24 Me. 339; *Gracie v. Palmer*, 8 Wheat. (U. S.) 605; *Briggs v. Boston, etc., R. Co.*, 6 Allen (Mass.) 246; *Lickbarrow v. Mason*, 6 East 21, note; *Wilson v. Dickson*, 2 Barn. & Ald. 2; *Jones v. Pearle*, 1 Strange 556. The purchaser would not get a good title.

<sup>3</sup> See 13 Am. & Eng. Ency. of Law, 580, *et seq.* for a synopsis of the provisions of many of statutes.

<sup>4</sup> *Martin v. McLaughlin*, 9 Col. 153; *Nathan Bros. v. Shivers*, 71 Ala. 117; *North v. London, etc., R. Co.*, 14 C. B. N. S. 132, 32 L. J. C. P. 156; *Field v. Newport, etc., R. Co.*, 3 H. & N. 409, s. c. 27 L. J. Exch. 396; *Adams Exp. Co. v. Schlessinger*, 75 Pa. St. 246.

<sup>5</sup> *Rankin v. Memphis, etc., Co.*, 9 Heisk. (Tenn.) 564, s. c. 24 Am. R. 339.

<sup>6</sup> *Notara v. Henderson*, L. R. 5 Q. B. 346; *Butler v. Murray*, 30 N. Y. 88; *Propeller Mohawk*, 8 Wall. (U. S.) 153.

<sup>7</sup> See *ante*, § 1559; *Galt v. Archer*, 7 Gratt. (Va.) 307.

<sup>8</sup> *Gregg v. Illinois Cent. R. Co.*, 147 Ill. 550, s. c. 35 N. E. R. 343; *Reine-man v. Covington, etc., R. Co.*, 51

ditional delivery reserving the lien,<sup>1</sup> and if the delivery is obtained by fraudulent representations,<sup>2</sup> or if the possession of the goods is tortiously taken away from the carrier,<sup>3</sup> its lien is not waived. Nor is it waived either in whole or in part by a delivery of part of the property unless such is the intention of the parties. The whole amount of the freight is a lien upon each and every part of the goods, and, while the delivery of a part releases the lien upon that part it does not operate as a waiver of the lien upon the balance for the entire amount of the freight due upon all the goods.<sup>4</sup> A refusal to deliver the goods upon other grounds, without asserting or claiming any lien, has been held to be a waiver of the carrier's right to detain them on the ground that it has a lien on them for its freight.<sup>5</sup> So, it has been held that the carrier waives its lien by suing out an attachment and causing it to be levied on the same property.<sup>6</sup> It may also be waived by giving credit in the contract of carriage beyond the time when the property is to be delivered

Iowa 338, s. c. 1 N. W. R. 619; Geneva, etc., R. Co. v. Sage, 35 Hun (N. Y.) 95; Bigelow v. Heaton, 4 Denio (N. Y.) 496; Lake Shore, etc., R. Co., v. Ellsey, 85 Pa. St. 283; Sears v. Wills, 4 Allen (Mass.) 212; Bailey v. Quint, 22 Vt. 474; Egan v. Cargo of Laths, 43 Fed. R. 480.

<sup>1</sup> The Eddy, 5 Wall. (U. S.) 481; Bags of Linseed, 1 Black (U. S.) 108; Costello v. Seven Hundred, etc., Laths, 44 Fed. R. 105; McCullough v. Hellwig, 66 Md. 269, s. c. 7 Atl. R. 455; Cuff v. Ninety-five tons of Coal, 46 Fed. R. 670.

<sup>2</sup> Bigelow v. Heaton, 4 Denio (N. Y.) 496, s. c. 6 Hill 43; One Hundred, etc., Tons of Coal, 4 Blatchf. (U. S.) 368; Hays v. Riddle, 1 Sandf. (N. Y.) 248; Wallace v. Woodgate, Ryan & M. 193.

<sup>3</sup> Boggs v. Martin, 13 B. Mon. (Ky.) 239. See, also, Lane v. Old Colony, etc., R. Co., 14 Gray (Mass.) 143.

<sup>4</sup> New Haven, etc., Co. v. Campbell,

128 Mass. 104, s. c. 35 Am. R. 360; Lane v. Old Colony R. Co., 14 Gray (Mass.) 143; Fuller v. Bradley, 25 Pa. St. 120. See, also, Philadelphia, etc., R. Co. v. Dows, 15 Phila. (Pa.) 101; Chicago, etc., R. Co. v. Northwestern, etc., R. Co., 38 Iowa 377; Fox v. Holt, 36 Conn. 558; Sodergren v. Flight, 6 East 622, note, and compare New York, etc., R. Co. v. Sanders, 134 Mass. 53. A partial delivery will not be deemed a constructive delivery of all, so as to waive the carrier's lien, unless such was the intention of the parties, and that is usually a question of fact. Boggs v. Martin, 13 B. Mon. (Ky.) 239; New Haven, etc., Co. v. Campbell, 128 Mass. 104.

<sup>5</sup> Adams Ex. Co. v. Harris, 120 Ind. 73, s. c. 21 N. E. R. 340, 7 L. R. A. 214, 40 Am. & Eng. R. Cas. 151; Lehigh v. Mobile, etc., R. Co., 58 Ala. 165. See, also, Louisville, etc., R. Co. v. McGuire, 79 Ala. 395.

<sup>6</sup> Wingard v. Banning, 39 Cal. 543.

and placed out of the carrier's possession and control.<sup>1</sup> But this is true only when the contract or stipulation is clearly inconsistent with the idea that the freight is to be paid as a condition precedent to delivery or that the carrier is to have its lien, for the presumption is in favor of its existence, in the absence of anything to the contrary, and the carrier will not be deprived of the security which is thus afforded it, unless the terms of the agreement, or other circumstances, are clearly inconsistent with the retention of the goods for that purpose.<sup>2</sup>

<sup>1</sup> *Pinney v. Wells*, 10 Conn. 104; *Chandler v. Belden*, 18 Johns. (N. Y.) 157; *Chase v. Westmore*, 5 M. & S. 180; *Raymond v. Tyson*, 17 How. (U. S.) 53; *Alsager v. St. Katherine's Dock Co.*, 14 M. & W. 794; *Tomvaco v. Simpson*, 19 Com. B. N. S. 453, L. R. 1 C. P. 363.

<sup>2</sup> *The Bird of Paradise*, 5 Wall. (U. S.) 545; *The Kimball*, 3 Wall. (U. S.) 37; *Crawshay v. Honfray*, 4 B. & Ald. 50; *Howard v. Macondray*, 7 Gray (Mass.) 516; *Tate v. Meek*, 8 Taunt. 280; *The Schooner Volunteer*, 1 Sumn. (U. S.) 551.

## CHAPTER LXVI.

### RAILROADS AS CARRIERS OF PASSENGERS.

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| <p>§ 1573. The general doctrine.</p> <p>1574. The duty to carry.</p> <p>1575. Refusal to carry—Extraordinary press of business.</p> <p>1576. Excuses for refusal to carry—Disregard of rules and regulations.</p> <p>1577. Excuses for refusal to carry—Improper or unfit persons.</p> <p>1578. Who are passengers.</p> <p>1579. The relation of passenger and carrier—When it begins.</p> <p>1580. Relation of passenger and carrier—Authority of subordinate employees to create.</p> <p>1581. Trespassers and intruders.</p> <p>1582. Taking passage on freight trains, hand-cars and the like.</p> <p>1583. Nature of the liability as a carrier of passengers.</p> | <p>§ 1584. Accidents.</p> <p>1585. Degree of care required of railroad passenger carriers—General rule.</p> <p>1586. Duty as to road-bed and tracks.</p> <p>1587. Duty as to engines, cars, equipments and appliances.</p> <p>1588. Duty to provide and equip trains with modern and improved appliances.</p> <p>1589. Care required in operation of trains.</p> <p>1590. Station buildings—Depots—Negligence in maintaining.</p> <p>1591. Duty to protect passengers from injury by third persons.</p> <p>1592. Termination of the relation of carrier and passenger.</p> |
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§ 1573. The general doctrine.—Railroad companies are, as a general rule, public carriers of passengers. There may, of course, be railroad companies that are not public carriers of passengers, as for instance, a company operating a road exclusively for its own private purpose,<sup>1</sup> or for the exclusive

<sup>1</sup> *Wade v. Lutch, etc., Co.*, 74 Fed. R. 517, citing *Hutchinson on Carriers*, § 57. In the case of *Albion Lumber Co. v. DeNobra*, 72 Fed. R. 739, it was held that a lumber company operating a railroad for the purpose of hauling logs was liable as a carrier of passengers to an employee

who rode on one of the trains by direction of the company's superintendent, and the rule that the happening of an accident is *prima facie* evidence of negligence was also applied. It seems to us that in some respects the case goes too far. The cases of *Hoar v. Maine, etc., R. Co.*, 70 Me.

transportation of freight, but these are exceptional instances for the rule that railroad companies are public carriers is almost universal. It is safe to say that a company incorporating under a general law, or accepting a special charter, granting the franchise of owning and operating a railroad becomes a public carrier of passengers inasmuch as the consideration for the grant is the implied undertaking on its part to serve the community as a public carrier.<sup>1</sup> It is not, however, the duty of a railroad company to carry passengers on all of its trains for it may designate the trains on which passengers shall be carried and no one can justly demand to be transported as a passenger on any other trains than those provided and equipped for the transportation of passengers or those on which passengers are customarily carried or on which the company invites them to travel. Where a railroad company holds out to the public that it will carry passengers on specified trains or cars it may be held bound to carry passengers on such cars or trains.<sup>2</sup> But it does not follow that because a person runs trains over a railroad he is necessarily a public carrier of passengers.<sup>3</sup> It has been held that where trains are run over a railroad the presumption is that they are managed

65; *Duff v. Allegheny, etc., R. Co.*, 91 Pa. St. 458, and *Morris v. Brown*, 111 N. Y. 318, were distinguished.

<sup>1</sup> *Ante*, §§ 1392, 1393; *Beckman v. Saratoga, etc., R. Co.*, 3 Paige 45. See *Gibson v. Mason*, 5 Nev. 283; *Davis v. Mayor*, 14 N. Y. 506; *Slatten v. Des Moines, etc., R. Co.*, 29 Iowa 148.

<sup>2</sup> *International, etc., Co. v. Prince*, 77 Tex. 560. See *Nashville, etc., R. Co. v. Messino*, 1 Sneed 220; *Dlabola v. Manhattan, etc., R. Co.*, 29 N. Y. S. R. 149; *Oviatt v. Dakota, etc., R. Co.*, 43 Minn. 300; *Kellow v. Central Iowa, etc., R. Co.*, 68 Iowa 470; *Citizens', etc., R. Co. v. Twiname*, 111 Ind. 587; *Galveston, etc., R. Co. v. Hewitt*, 67 Tex. 473.

<sup>3</sup> In *Shoemaker v. Kingsbury*, 12

Wall. 369, the distinction between a private and public carrier was pointed out and it was held that a contractor who ran construction trains over the road was not a public carrier of passengers. The court cited the case of *Sullivan v. Philadelphia, etc., R. Co.*, 30 Pa. St. 234. But one who runs trains for the carriage of passengers over a railroad owned by a railroad company may be a public carrier. *Davis v. Button*, 78 Cal. 247, s. c. 18 Pac. R. 133, 20 Pac. R. 545. See, generally, *Caldwell v. Richmond, etc., R. Co.*, 89 Ga. 550, s. c. 15 S. E. R. 678; *Truex v. Erie, etc., R. Co.*, 4 Lans. 198; *Gruber v. Washington, etc., R. Co.*, 92 N. C. 1, s. c. 21 Am. & Eng. R. Cas. 438.

and controlled by the company owning the road, and the burden is on such company to prove that it did not operate the road<sup>1</sup> but, although the trains run over the same road, it may be shown that the particular train was not operated by the company owning the road.<sup>2</sup> We suppose that where different and independent carriers run trains over the same road and a person takes passage on one of the trains under a contract with one of the companies that the company with which the contract is made is to be regarded as the carrier and answerable for injuries resulting from negligence in managing the particular train,<sup>3</sup> although the company owning the road may be responsible for injuries caused by a negligent breach of duty in respect to the track, the road-bed or the like.<sup>4</sup> It is probably true that a passenger would have a right of action against the lessee company for injuries received while traveling on one of its trains, because of the negligence of such company in running trains over an unsafe track.<sup>5</sup> According to the prevailing view the passenger in such a case might maintain an action against both companies.<sup>6</sup> We have heretofore considered the rule regarding the liability of lessor and lessee and expressed the opinion that where the lease is authorized and the lessor has no control over the trains it is not liable for injuries resulting from negligence in operating the trains.<sup>7</sup>

<sup>1</sup> *Ferguson v. Wisconsin, etc., R. Co.*, 63 Wis. 145, s. c. 23 N. W. R. 123.

<sup>2</sup> *Anderson v. Des Moines, etc., Co.*, (Iowa) 66 N. W. R. 64.

<sup>3</sup> *Chicago, etc., R. Co. v. Groves*, (Kan.) 44 Pac. R. 628; *Byrne v. Kansas City, etc., R. Co.*, 61 Fed. R. 605; *Smith v. St. Louis, etc., R. Co.*, 85 Mo. 418; *Webb v. Portland, etc., R. Co.*, 57 Me. 117.

<sup>4</sup> *Ante*, §§ 467-469; *Central, etc., Co. v. Phinazee*, 93 Ga. 488, s. c. 21 S. E. R. 66.

<sup>5</sup> *Chase v. Jamestown, etc., R. Co.*, 38 N. Y. S. R. 954.

<sup>6</sup> See authorities cited in the following note.

<sup>7</sup> *Ante*, §§ 459, 466, 467, 468, 469. See, also, *Nugent v. Boston, etc., R. Co.*, 80 Me. 62; *Mahoney v. Atlantic, etc., R. Co.*, 63 Me. 68; *Naglee v. Alexandria, etc., R. Co.*, 83 Va. 707; *Littlejohn v. Fitchburg, R. Co.*, 148 Mass. 478; *St. Louis, etc., R. Co. v. Curl*, 28 Kan. 622; *Killian v. Augusta, etc., R. Co.*, 78 Ga. 749; *Macon, etc., R. Co. v. Mayes*, 49 Ga. 355; *Chattanoga, etc., R. Co. v. Liddell*, 85 Ga. 482, s. c. 11 S. E. R. 853; *International, etc., R. Co. v. Dunham*, 68 Tex. 231; *Gulf, etc., R. Co. v. Morris*, 67 Tex. 692;



§ 1574. **The duty to carry.**—There is a general duty on the part of railroad companies to receive and carry passengers. A railroad company does not occupy the same position as an individual carrier inasmuch as it assumes the duty of serving the public as a consideration for the rights and privileges granted it by the sovereign.<sup>1</sup> It is, therefore, erroneous to accept the statement of some of the old books upon this subject. Under the modern decisions the rule is clear, for they affirm that a railroad company is under an obligation to carry persons who properly present themselves and request transportation.<sup>2</sup> It is to be understood, of course, that there are cases in which a railroad company may rightfully refuse to accept persons as passengers. It is not every person that the carrier is bound to accept as a passenger, nor is it bound under all circumstances to receive passengers, for, as we shall hereafter show, the carrier may in many cases be excused for refusing to accept persons as passengers.<sup>3</sup>

§ 1575. **Refusal to carry—Extraordinary press of business.**—The principle which is asserted in the cases holding that a common carrier of things is excused where its failure to carry is caused by an unusual press of business applies to passenger carriers. It seems quite clear that if the carrier is disabled by an unusual press of business from accepting all who offer themselves as passengers it can not be held guilty of a breach of duty.<sup>4</sup> We suppose that it is the duty of a railroad com-

*Ingersoll v. Stockbridge, etc., R. Co.,* 8 Allen 438; *Pennsylvania R. Co. v. St. Louis, etc., R.,* 118 U. S. 290.

<sup>1</sup> *Ante*, §§ 1392, 1393.

<sup>2</sup> *Lake Erie, etc., R. Co. v. Acres,* 108 Ind. 548, s. c. 28 Am. & Eng. R. Cas. 112; *Bennett v. Dutton,* 10 N. H. 481; *Jencks v. Coleman,* 2 Sumn. 221; *Pearson v. Duane,* 4 Wall. 605; *Indianapolis, etc., R. Co. v. Rinard,* 46 Ind. 293; *Hannibal, etc., R. Co. v. Swift,* 12 Wall. 262; *Mershon v. Hobensack,* 22 N. J. Law 372; *Galena, etc., R. Co. v. Yarwood,* 15 Ill. 468;

*Hutchinson on Carriers,* § 538; *Wood on Railroads,* 978.

<sup>3</sup> *Post*, § 1577.

<sup>4</sup> *Chicago, etc., R. Co. v. Carroll,* 5 Ill. App. 201; *Evansville, etc., R. Co. v. Duncan,* 28 Ind. 441; *Chicago, etc., R. Co. v. Fisher,* 31 Ill. App. 36. It is held, however, that although a carrier is not bound to receive "an unusual and unexpected number of passengers," yet, if it does receive them it is liable for a failure to exercise that degree of care which the law requires. *Evansville, etc., R. Co. v.*

pany to exercise due care and diligence to meet demands that it has reason to expect will be made upon it,<sup>1</sup> but we think it is going too far to say, as some of the authorities do, that it is bound to do all that human foresight and care can do to enable it to meet the extraordinary demand.

§ 1576. **Excuses for a refusal to carry—Disregard of rules and regulations.**—Railroad companies have a general power to make reasonable rules and regulations for the government of their business<sup>2</sup> and to require persons who seek to become passengers, to conform to such rules and regulations. A person who refuses to comply with such rules and regulations can not maintain an action against a railroad company for refusing to accept him as a passenger. The authorities warrant the conclusion that passengers must know that rules and regulations are necessary to the proper conduct and management of the business affairs of a railroad company and must take notice of general rules and regulations.<sup>3</sup> It is always essential,

Duncan, 28 Ind. 441, s. c. 3 Am. Negl. Cas. 91, 95. But see Chicago, etc., R. Co. v. Dumser, (Ill.) 43 N. E. R. 698. The case just cited may, perhaps, be discriminated from the other decisions in that the railroad company having specially invited an unusual number of persons was bound to make provision for them.

<sup>1</sup> Chicago, etc., R. Co. v. Fisher, 31 Ill. App. 36. See Purcell v. Richmond, etc., R. Co., 108 N. C. 414, s. c. 12 S. E. R. 954, 47 Am. & Eng. R. Cas. 457; Branch v. Wilmington, etc., R. Co., 77 N. Car. 347.

<sup>2</sup> Crawford v. Cincinnati, etc., R. Co., 26 Ohio St. 580; Drake v. Pennsylvania R. Co., 137 Pa. St. 352, s. c. 20 Atl. R. 994; ante, §§ 199, 200, 202. See, also, Hurst v. Great Western R. Co., 19 C. B. (N. S.) 310; Gordon v. Manchester, etc., R. Co., 52 N. H. 596; Denton v. Great Northern R. Co., 5 El. & Bl. 860; Rogers v. Atlantic, etc., R. Co., (N. J.) 34 Atl. R. 11; Boster v. Chesapeake,

etc., R. Co., 36 W. Va. 318, s. c. 15 S. E. R. 158, 52 Am. & Eng. R. Cas. 357; McRae v. Wilmington, etc., R. Co., 88 N. C. 526, s. c. 43 Am. R. 745; Britton v. Atlanta, etc., R. Co., 88 N. Car. 536, s. c. 43 Am. R. 749; Chicago, etc., R. Co. v. Graham, 3 Ind. App. 28, s. c. 29 N. E. R. 170; Chicago, etc., R. Co. v. McLallen, 84 Ill. 109; State v. Chovin, 7 Iowa 204; Florida, etc., R. Co. v. Hirst, 30 Fla. 1, s. c. 11 So. R. 506; Gray v. Cincinnati, etc., R. Co., 11 Fed. R. 683; Johnson v. Concord, etc., R. Co., 46 N. H. 213; Northern, etc., R. Co. v. O'Conner, 76 Md. 207.

<sup>3</sup> Gulf, etc., R. Co. v. Moody, (Tex. Civ. App.) 30 S. W. R. 574; Southern, etc., R. Co. v. Hinsdale, 38 Kan. 507, s. c. 16 Pac. R. 937. Telegraph companies are governed by substantially the same rules as railroad carriers and it is held that they may make reasonable rules and regulations of which persons dealing with

we may add, that such rules should be reasonable, should not violate the law and should not assume to relieve the carrier from the performance of duties which the law does not permit it to evade or refuse to perform.<sup>1</sup> Where the company establishes reasonable rules and regulations a passenger has no right to require a conductor to deviate from them.<sup>2</sup> Courts will not control the exercise of a discretionary power conferred upon a railroad company, and hence will not annul or disregard reasonable rules regarding the trains on which passengers shall be carried, the places and times where trains shall stop, the division of passengers into first and second class, the time and mode of purchasing tickets and of entering trains and the like, but courts will interfere in cases where there is a clear abuse of discretion or an illegal attempt to evade the performance of duties enjoined by law, or to deprive the public of rights which the law awards them.<sup>3</sup>

them must take notice. *Behm v. Western Union Telegraph Co.*, 8 Biss. 131; *Birney v. New York Telegraph Co.*, 18 Md. 341; *United States, etc., Co. v. Gildersleve*, 29 Md. 232; *Western Union Tel. Co. v. Neel*, 86 Tex. 368, s. c. 25 S. W. R. 15. See, generally, *Given v. Western Union Telegraph Co.*, 24 Fed. R. 119; *Western Union, etc., Co. v. Harding*, 103 Ind. 505, s. c. 3 N. E. R. 172; *Stevenson v. Montreal Telegraph Co.*, 16 U. C. Q. B. 530. As to the duty of passenger to ascertain when and where rules require trains to stop, see *Atchison, etc., R. Co. v. Gants*, 38 Kan. 608; *Dietrich v. Pennsylvania R. Co.*, 71 Pa. St. 432. But, see, *Lake Shore, etc., R. Co. v. Rosenzweig*, 113 Pa. St. 519, s. c. 6 Atl. R. 545, 26 Am. & Eng. R. Cas. 145; *Hufford v. Grand Rapids, etc., R. Co.*, 64 Mich. 631, s. c. 31 N. W. R. 544; *New York, etc., R. Co. v. Winter*, 143 U. S. 60, s. c. 12 Sup. Ct. R. 356. It is held that a passenger is not bound to take notice

of secret rules but may rely on the statements of the conductor. *Georgia, R. etc., Co. v. Murden*, 86 Ga. 434, s. c. 12 S. E. R. 630.

<sup>1</sup> *Eddy v. Rider*, 79 Tex. 53; *Norfolk, etc., R. Co. v. Wysor*, 82 Va. 250, s. c. 26 Am. & Eng. R. Cas. 234; *Central, R. etc., Co. v. Strickland*, 90 Ga. 562, s. c. 16 S. E. R. 352; *Day v. Owen*, 5 Mich. 520; *Brown v. Memphis, etc., R. Co.*, 4 Fed. R. 37. See, generally, *Mahoney v. Detroit, etc., R. Co.*, 93 Mich. 612; *Stewart v. Brooklyn, etc., R. Co.*, 90 N. Y. 588, s. c. 43 Am. R. 185; *South, etc., R. Co. v. Rhodes*, 25 Fla. 40, s. c. 5 So. R. 633, 3 L. R. A. 733; *Louisville, etc., R. Co. v. Fleming*, 14 Lea (Tenn.) 128, s. c. 18 Am. & Eng. R. Cas. 347; *Chilton v. St. Louis, etc., R. Co.*, 114 Mo. 88, s. c. 21 S. W. R. 457.

<sup>2</sup> *Lake Shore, etc., R. Co. v. Pierce*, 47 Mich. 277, s. c. 11 N. W. R. 157, 3 Am. & Eng. R. Cas. 340.

<sup>3</sup> *Cleveland, etc., R. Co. v. Bartram*,

§ 1577. **Excuses for refusal to carry—Improper or unfit persons.**—A railroad carrier may excuse its refusal to accept a person as a passenger by showing that because of his character, conduct, or condition he is not a fit person to enter its trains with other persons, but it is held that *prima facie* every citizen is entitled to be carried as a passenger.<sup>1</sup> A carrier can not rightfully refuse to carry a person who is ill,<sup>2</sup> unless the disease from which he is suffering is contagious or so loathsome as to render him unfit to enter a car with other travelers.<sup>3</sup> A carrier, it has been held, is excused from transporting a person who goes upon its train for the purpose of committing a crime or one who is fleeing from justice.<sup>4</sup> It is held that a carrier is not bound to accept as a passenger one who desires to travel for the purpose of depriving it of business.<sup>5</sup> We think that

11 Ohio St. 457; *Watkins v. Pennsylvania R. Co.*, 21 D. C. 1, 52 Am. & Eng. R. Cas. 159; *International, etc., R. Co. v. Goldstein*, 2 Tex. App. (Civil Cases) 206; *Browne v. Raleigh, etc., R. Co.*, 108 N. Car. 34, s. c. 12 S. E. R. 958, 47 Am. & Eng. R. Cas. 544; *Houston, etc., R. Co. v. Moore*, 49 Tex. 31; *Sira v. Wabash, etc., R. Co.*, 115 Mo. 127, s. c. 21 S. W. R. 905; *Caterham R. Co. v. London, etc., R. Co.*, 1 C. B. (N. S.) 410; *Connell v. Mobile, etc., R. Co.*, (Miss.) 7 So. R. 344; *Texas, etc., R. Co. v. Ludlam*, 57 Fed. R. 481; *Pennsylvania Co. v. Wentz*, 37 Ohio St. 333; *Chicago, etc., R. Co. v. Randolph*, 53 Ill. 510; *West Chester, etc., R. Co. v. Miles*, 55 Pa. St. 209; *Pennsylvania R. Co. v. Langdon*, 92 Pa. St. 21; *Macon, etc., R. Co. v. Johnson*, 38 Ga. 409. For an example of an unreasonable rule, see *Pittsburgh, etc., R. Co. v. Lyon*, 123 Pa. St. 140, s. c. 16 Atl. R. 607.

<sup>1</sup> *Norfolk, etc., R. Co. v. Galliher*, 89 Va. 639; *Chicago, etc., R. Co. v. Pillsbury*, (Ill.) 8 N. E. R. 803. But see 123 Ill. 9, 14 N. E. R. 22; *Winnegar v. Central, etc., R. Co.*, 85 Ky. 547, s. c. 4 S. W. R. 237. See,

generally, *Gillingham v. Ohio, etc., R. Co.*, 35 W. Va. 588, s. c. 14 S. E. R. 243, 14 L. R. A. 798; *Thurston v. Union, etc., R. Co.*, 4 Dill. 321; *Contra Costa, etc., R. Co. v. Moss*, 23 Cal. 323; *Colorado, etc., R. Co. v. Union, etc., R. Co.*, 41 Fed. R. 293; *Waldron v. Chicago, etc., R. Co.*, 1 Dak. 351, 46 N. W. R. 456; *Camden, etc., R. Co. v. Belknap*, 21 Wend. 354; *Saltonstall v. Stockton*, 1 Taney (U. S.) 11.

<sup>2</sup> *Pullman, etc., Co. v. Barker*, 4 Colo. 344.

<sup>3</sup> *Walsh v. Chicago, etc., R. Co.*, 42 Wis. 23.

<sup>4</sup> *Thurston v. Union, etc., R. Co.*, 4 Dill. 321. It has been held, however, that a carrier can not sit in judgment upon the morals of persons who apply for transportation as passengers but must receive them if they properly conduct themselves. *Brown v. Memphis, etc., R. Co.*, 5 Fed. R. 499, 7 Fed. R. 51, 1 Am. & Eng. R. Cas. 247. See *Bass v. Chicago, etc., R. Co.*, 36 Wis. 450, s. c. 17 Am. R. 495; *Pearson v. Duane*, 4 Wall. 605.

<sup>5</sup> *Barney v. Oyster, etc., Co.*, 67 N. Y. 301, citing *Story on Bailments*,

the carrier can not rightfully refuse to carry a person from point to point on its line simply because he may be going to such points to solicit business for a competing carrier, but it may, as we believe, refuse to carry him if he undertakes to deprive it of business while on its trains. The adjudged cases affirm that a carrier is not bound, as matter of law, to accept as a passenger an insane person whose condition is such that his presence in the train will probably put other passengers in fear or otherwise substantially annoy them.<sup>1</sup> We are inclined to think the doctrine of the cases referred to is not to be extended but is to be limited and carefully guarded. Intoxicated persons may rightfully be denied entrance to trains where their condition is such as to make their presence disgusting to other travelers or such as to substantially interfere with the comfort of other passengers,<sup>2</sup> but it has been held that where a person who is slightly intoxicated and not in such a condition as to render it probable that he will be disorderly or annoy others he can not rightfully be refused carriage as a passenger.<sup>3</sup> A carrier may justly decline to accept as a passenger a person whose presence on its trains will probably lead to mob violence and result in injury to its property.<sup>4</sup> In one of the cases it is held that a carrier is not bound to receive a person who, because of his mental or physical condition, is unable to care for himself and is not accompanied by an attendant, but if it does receive him it is bound to bestow upon him such reasonable and necessary care as his condition requires.<sup>5</sup>

§ 1578. Who are passengers.—We think it is safe to say that the general rule is that every one on the passenger trains of a railroad company and there for the purpose of carriage with the consent, express or implied, of the company, is pre-

§ 591, *a*; Angell on Carriers, § 530; Jencks v. Coleman, 2 Sumn. 221.

<sup>1</sup> Meyer v. St. Louis, etc., R. Co., 54 Fed. R. 116; Putnam v. Broadway, etc., R. Co., 55 N. Y. 108. See Pearson v. Duane, 4 Wall. 605.

<sup>2</sup> Pittsburg, etc., R. Co. v. Vandyne, 57 Ind. 576.

<sup>3</sup> Milliman v. New York, etc., R. Co., 66 N. Y. 642; Pittsburg, etc., R. Co. v. Vandyne, 57 Ind. 576.

<sup>4</sup> Chicago, etc., R. Co. v. Pillsbury, 123 Ill. 9.

<sup>5</sup> Croom v. Chicago, etc., R. Co., 52 Minn. 296, s. c. 53 N. W. R. 1128.

sumptively a passenger.<sup>1</sup> There must, as we believe, be in some form an acceptance by the company of the person as a passenger.<sup>2</sup> This acceptance, however, need not, by any means, be direct or express, but may be, and generally is, implied from circumstances. The presumption to which we have referred may, of course, be rebutted, and it will not, it is evident, ordinarily arise where the person occupies a position on the train which passengers have no right to occupy,<sup>3</sup> or goes upon a train on which passengers are not carried. The presumption that a person on a train is a passenger does not prevail in cases where the train is one on which passengers are not ordinarily carried, as for instance, a construction train, an oil train or the like. It has been held, and in our opinion justly so held, that a person in the caboose of a freight train can not be presumed to be a passenger,<sup>4</sup> but it may, of course, be shown that passengers were carried on such trains. The courts have held the relation of carrier and passenger to exist in cases of mail agents or postal clerks<sup>5</sup> and a similar rule is

<sup>1</sup> *Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442; *Pennsylvania, etc., R. Co. v. Price*, 96 Pa. St. 256; *Bricker v. Pennsylvania, etc., R. Co.*, 132 Pa. St. 1; *Pennsylvania, etc., R. Co. v. Books*, 57 Pa. St. 339; *Creed v. Pennsylvania, etc., R. Co.*, 86 Pa. St. 139.

<sup>2</sup> *McLarin v. Atlanta, etc., R. Co.*, 85 Ga. 504, s. c. 11 S. E. R. 840; *Coleman v. Georgia, R. etc., Co.*, 84 Ga. 1, s. c. 10 S. E. R. 498.

<sup>3</sup> The conclusion stated in the text is well illustrated by the cases where tramps attempt to travel on trains, or do travel, and take unusual places thereon.

<sup>4</sup> *Atchison, etc., R. Co. v. Headland*, 18 Colo. 477, s. c. 33 Pac. R. 185, 8 Am. R. & Corp. Rep. (Lewis) 105; *Eaton v. Delaware, etc., R. Co.*, 57 N. Y. 382.

<sup>5</sup> *Arrowsmith v. Nashville, etc., R. Co.*, 57 Fed. R. 165; *Cleveland, etc., R. Co. v. Ketcham*, 133 Ind. 346, s. c.

33 N. E. R. 116; *Seybolt v. New York, etc., R. Co.*, 95 N. Y. 562; *Mellor v. Missouri, etc., R. Co.*, 105 Mo. 455, s. c. 10 L. R. A. 36, 16 S. W. R. 849; *Gulf, etc., R. Co. v. Wilson*, 79 Tex. 371, s. c. 11 L. R. A. 486; *Magoffin v. Missouri, etc., R. Co.*, 102 Mo. 540, s. c. 15 S. W. R. 76; *Grant v. Raleigh, etc., R. Co.*, 108 N. C. 462, s. c. 13 S. E. R. 209. See, generally, *Nolton v. Western, etc., R. Co.*, 15 N. Y. 444; *Blair v. Erie, etc., R. Co.*, 66 N. Y. 313; *Yeomans v. Contra Costa, etc., Co.*, 44 Cal. 71; *Hammond v. Northeastern, etc., R. Co.*, 6 So. Car. 130; *Ohio, etc., R. Co. v. Voight*, 122 Ind. 288. A soldier riding under a contract between the carrier and the government is held to be a passenger. *Galveston, etc., R. Co. v. Parsley*, 6 Tex. Civ. App. 150, s. c. 25 S. W. R. 64. For decisions upon the statute of Pennsylvania in relation to mail agents, see *Pennsylvania, etc., R.*

declared as to express messengers.<sup>1</sup> Persons who pay a consideration for passage no matter in what form are generally regarded as passengers,<sup>2</sup> and so, as will be hereafter shown, are persons who ride on passes. It is held in very many cases that a person may become a passenger before the payment of fare, and that where a persons enters a train he is to be regarded as a passenger unless he has entered without right, although he may not have paid his fare, but this rule does not oppose the doctrine that a carrier may require the payment of fare before admitting persons to the train. As to whether an employe riding on a train is a passenger there is some conflict but the rule seems to be that if he is being carried to and from his working place he is not a passenger, but if he is carried for his own convenience or business he is a passenger.<sup>3</sup> The employe of a sleeping car company is rightly held not to be a passenger although he is entitled to require reasonable care on the part of the railroad company.<sup>4</sup> It is quite well settled that one who gets on a train by mistake is entitled to be treated as a passenger.<sup>5</sup> In one of the cases this doctrine

*Co. v. Price*, 96 Pa. St. 256; *Bricker v. Pennsylvania*, 132 Pa. St. 1. It seems to us that the validity of that statute may well be questioned, but in *Price v. Pennsylvania Railroad*, 113 U. S. 218, s. c. 5 Sup. Ct. R. 427, its constitutionality is recognized.

<sup>1</sup>*Brewer v. New York, etc., R. Co.*, 124 N. Y. 59, s. c. 11 L. R. A. 483; *Blair v. Erie R. Co.*, 66 N. Y. 313; *Fordyce v. Jackson*, 66 Ark. 594, 20 S. W. R. 597, 598; *post*, § 1604.

<sup>2</sup>*Union, etc., R. Co. v. Nichols*, 8 Kan. 505; *Bartlett v. New York, etc., R. Co.*, 25 Jones & S. (N. Y.) 348; *Commonwealth v. Vermont, etc., R. Co.*, 108 Mass. 7.

<sup>3</sup>*Gillshannon v. Stony Brook, etc., R. Co.*, 10 Cush. 228; *Seaver v. Boston, etc., R. Co.*, 14 Gray 466; *Gilman v. Eastern R. Co.*, 10 Allen 233; *O'Brien v. Boston, etc., Railroad*, 138 Mass. 387; *Manville v. Cleveland Railroad Co.*, 11 Ohio St. 417; *O'Connell v. Bal-*

*timore, etc., Railroad*, 20 Md. 212; *Doyle v. Fitchburg, etc., R. Co.*, 162 Mass. 66, s. c. 37 N. E. R. 770. See, generally, *Chicago, etc., R. Co. v. Bryant*, 65 Fed. R. 969; *International, etc., R. Co. v. Ryan*, 82 Tex. 565, s. c. 18 S. W. R. 219; *Kansas City, etc., R. Co. v. Phillips*, 98 Ala. 159, 13 So. R. 65; *Denver, etc., R. Co. v. Dwyer*, 3 Colo. App. 408, s. c. 33 Pac. R. 815.

<sup>4</sup>*Hughson v. Richmond, etc., R. Co.*, 2 D. C. App. 98, 22 Wash. L. Rep. 55. But see *Jones v. St. Louis, etc., R. Co.*, (Mo.) 28 S. W. R. 883.

<sup>5</sup>*Lake Shore, etc., R. Co. v. Rosenzweig*, 113 Pa. St. 519; *Cincinnati, etc., R. Co. v. Carper*, 112 Ind. 26, s. c. 3 Am. Neg. Cas. 186, 2 Am. St. R. 144; *Columbus, etc., R. Co. v. Powell*, 40 Ind. 37, s. c. 3 Am. Neg. Cas. 100; *International, etc., R. Co. v. Gilbert*, 64 Tex. 536, 22 Am. & Eng. R. Cas. 405; *Arnold v. Pennsylvania R. Co.*, 115 Pa. St. 135, s. c. 2 Am. St. R. 542, 28

was extended to one, who, having a ticket, got on a freight train,<sup>1</sup> but this case, as it seems to us, carries the doctrine too far, for persons are chargeable with knowledge that freight trains do not ordinarily carry passengers. It may be true that the plaintiff in the case referred to was not a trespasser, but he was not entitled to exact of the carrier that extraordinary degree of care which the law imposes on public carriers. One does not cease to be a passenger simply because he leaves the train, as for instance, when required to change cars,<sup>2</sup> but if he leaves it solely for his own convenience or to transact business of his own he can not be regarded as a passenger while so engaged and not on the train.<sup>3</sup> There is some diversity of opinion as to whether one who enters a train for the purpose of assisting a passenger is to be regarded as a passenger and there are cases which seem to hold that such a person is a passenger.<sup>4</sup> We are unable to assent to this doctrine as broadly held by some of the cases for it seems to us that the extraordinary duty of a carrier to a passenger, is not, as a general rule, owing to such a person,<sup>5</sup> although we have no doubt that the railroad

Am. & Eng. R. Cas. 189; *Lewis v. President, etc., of Delaware, etc., R. Co.*, 145 N. Y. 508, s. c. 40 N. E. 248.

<sup>1</sup> *Pattersons Ry. Acc. Law*, 405; 2 *Wood on Railroads*, 1047; 25 *Am. & Eng. Ency. of Law* 1083; *Hutchinson on Carriers*, § 555, *a*; *Bogges v. Chesapeake, etc., R. Co.*, 37 W. Va. 297, s. c. 23 L. R. A. 777.

<sup>2</sup> *Baltimore, etc., R. Co. v. State*, 60 Md. 449, s. c. 3 Am. Negl. Cas. 632; *Dwinelle v. New York, etc., R. Co.*, 120 N. Y. 117, s. c. 24 N. E. R. 319, 44 *Am. & Eng. R. Cas.* 384.

<sup>3</sup> *Johnson v. Boston, etc., R. Co.*, 125 Mass. 75, 3 Am. Neg. Cas. 791; *Webster v. Fitchburg, etc., R. Co.*, 161 Mass. 298, s. c. 37 N. E. R. 165, 10 *Lewis' Am. R. & Corp. Rep.* 448; *Buckley v. Old Colony, etc., R. Co.*, 161 Mass. 26, s. c. 36 N. E. R. 583; *DeKay v. Chicago, etc., R. Co.*, 41 Minn. 178, s. c. 43 N. W. R. 182, 4 L. R. A. 632. See,

generally, *Keokuk, etc., Co. v. True*, 88 Ill. 608; *State v. Grand Trunk, etc., R. Co.*, 58 Me. 176; *Dice v. Willamette, etc., R. Co.*, 8 Ore. 60; *Wandell v. Corbin*, 17 N. Y. S. R. 718.

<sup>4</sup> *Evansville, etc., R. Co. v. Athon*, 6 Ind. App. 295, s. c. 3 Am. Negl. Cas. 15; *Louisville, etc., R. Co. v. Crunk*, 119 Ind. 542, 21 N. E. R. 31, 3 Am. Neg. Cas. 229; *Galloway v. Chicago, etc., R. Co.*, 87 Iowa 458, s. c. 3 Am. Negl. Cas. 395. See *Cherokee, etc., R. Co. v. Hilson*, 95 Tenn. 1, 31 S. W. R. 737; *Texas, etc., R. Co. v. McGilvary*, (Tex. Civ. App.) 29 S. W. R. 67.

<sup>5</sup> See *New York, etc., R. Co. v. Mushrush*, 11 Ind. App. 192, s. c. 37 N. E. R. 954; *Missouri, etc., R. Co. v. Miller*, 8 Tex. Civ. App. 241, 27 S. W. R. 905; *Lucas v. New Bedford, etc., R. Co.*, 6 Gray 64, s. c. 3 Am. Neg. Cas. 735 (citing *Lygo v. Newbold*, 9 Exch. 302); *Dillingham v. Pierce*, (Tex.)



company owes to him the duty of exercising ordinary or reasonable care. There may possibly be cases where a person assists a passenger on a train, as, for instance, where the passenger is ill, feeble, too young to care for himself or the like, where it is proper to hold that the person rendering the assistance is a passenger, but where there is no reason for rendering assistance the person giving it can not, as we believe, be regarded as a passenger.

§ 1579. **The relation of passenger and carrier—When it begins.**—It is broadly stated in one of the cases that the fact that a person had purchased a ticket “created the relation of carrier and passenger, and the law imposed duties arising out of that relation both on the carrier and the passenger,”<sup>1</sup> but this, we venture to say, carries the rule too far. We do not believe that the mere fact that the intending passenger purchases a ticket creates the relation of carrier and passenger in such a sense as to exact of the carrier that high degree of care which the law prescribes. That duty, as we conceive, does not arise until the person holding the ticket has come under the charge of the carrier in some way as by entering a train or the like. A holder of a ticket is not always a passenger,<sup>2</sup> nor does the relation of carrier and passenger always begin with the acquisition of a ticket. A person may become a passenger

31 S. W. R. 203; *McKone v. Michigan*, etc., R. Co., 51 Mich. 601; *Grand Rapids, etc., R. Co. v. Martin*, 41 Mich. 667; *Doss v. Missouri*, etc., R. Co., 59 Mo. 27, s. c. 21 Am. R. 371; *Griswold v. Chicago*, etc., R. Co., 64 Wis. 652; *Tobin v. Portland*, etc., R. Co., 59 Me. 183, s. c. 8 Am. R. 415; *Central, R. etc., Co. v. Letcher*, 69 Ala. 106; *Holmes v. Northeastern*, etc., R. Co., L. R. 4 Exch. 254, L. R. 6 Exch. 123; *York v. Canada*, etc., S. Co., 22 Can. Sup. Ct. 167. One who boards a train to assist in caring for baggage has been held to be a trespasser, where the passenger proposed to fraudulently take the baggage as

his own. *Andrews v. Fort Worth*, etc., R. Co., (Tex.) 25 S. W. R. 1040.

<sup>1</sup> *Wabash, etc., R. Co. v. Rector*, 104 Ill. 296, s. c. 2 Am. Negl. Cas. 648. It is proper to say that we do not assert that the able court by which the case referred to was decided did not reach a correct conclusion in the particular instance, but we do respectfully say that it stated the rule too broadly. *Webster v. Fitchburg*, etc., R. Co., 161 Mass. 298, s. c. 37 N. E. R. 165, asserts what we believe to be the sound doctrine.

<sup>2</sup> *Johnson v. Boston*, etc., R. Co., 125 Mass. 75, s. c. 3 Am. Negl. Cas. 791.

before he has entered the train or vehicle of the carrier.<sup>1</sup> We think it safe to say that a person becomes a passenger when, intending to take passage, he enters a place provided for the reception of passengers, as a depot, waiting room or the like, at a time when such a place is open for the reception of persons intending to take passage on the trains of the company.<sup>2</sup> Where, however, by reasonable rules or regulations a railroad company designates the times at which places will be ready for the reception of passengers, a person can not become a passenger by entering such a place in violation of the rules or at an unreasonable time. It is held that one who enters a car of a train made up for its customary run, where the cars are prepared to receive passengers, although not standing at the station, becomes a passenger,<sup>3</sup> but it seems to us that the decision referred to is of doubtful soundness, for a person has no right to enter a train and impose a duty upon a railroad company unless he enters at a place where the rules or custom of the company provide for receiving passengers.<sup>4</sup>

§ 1580. Relation of passenger and carrier—Authority of subordinate employes to create.—The railroad company, by its rules and regulations or by its custom, may provide trains and places in which persons may be transported as passengers.

<sup>1</sup> *Rogers v. Kennebec Steamboat Co.*, etc., R. Co. v. Treadway, 142 Ind. 475, 86 Me. 261, s. c. 29 Atl. R. 1069, 3 s. c. 40 N. E. R. 807. See, generally, *McKimble v. Boston*, etc., R. Co., 139 Am. Neg. Cas. 590; *Brien v. Bennett*, 8 C. & P. 724.

<sup>2</sup> *Rogers v. Kennebec Steamboat Co.*, 86 Me. 261, s. c. 26 Atl. R. 1069, 3 Am. Negl. Cas. 590; *Shannon v. Boston*, etc., R. Co., 78 Me. 52, s. c. 2 Atl. R. 678; *Smith v. St. Paul*, etc., R. Co., 32 Minn. 1, s. c. 18 N. W. R. 827; *Warren v. Fitchburg*, etc., R. Co., 8 Allen 227; *Allender v. Chicago*, etc., R. Co., 37 Iowa 264, s. c. 3 Am. Negl. Cas. 323; *Poucher v. New York*, etc., R. Co., 49 N. Y. 263; *Hannibal*, etc., R. Co. v. *Martin*, 111 Ill. 219, s. c. 2 Am. Negl. Cas. 661; *Caswell v. Boston*, etc., R. Co., 98 Mass. 194; *Louisville*, etc., R. Co. v. *Treadway*, 142 Ind. 475, s. c. 40 N. E. R. 807.

<sup>3</sup> *Missouri*, etc., R. Co. v. *Simmons*, (Tex. Civ. App.) 33 S. W. R. 1096, citing *Houston*, etc., R. Co. v. *Washington*, (Tex. Civ. App.) 30 S. W. R. 719; *Missouri*, etc., R. Co. v. *Huff*, (Tex. Civ. App.) 32 S. W. R. 551.

<sup>4</sup> As we shall hereafter see the duty of a railroad company respecting its depots or station buildings is not so rigorous as that respecting its road-bed, tracks, cars and equipments.

The principle, which we have elsewhere discussed, that subordinate employes, such as conductors, brakemen, engineers, firemen and the like, can not change or abrogate the rules of the company requires the conclusion that such employes can not impose upon their employer the obligation of a public carrier of passengers by receiving persons on trains not provided for the carriage of passengers, or, as a general rule, by inviting them to ride in dangerous places not provided by their employer for passengers to occupy.<sup>1</sup> The adjudged cases are quite harmonious in support of the general doctrine we have stated,<sup>2</sup> but we are not to be understood as saying that persons who have become passengers may not in many instances be justified in obeying the directions of employes. It is clear that there is a marked difference between a case of one to whom the railroad company owes a duty as a public carrier and a case where the duty has not arisen. In the one case it may well be held that, within limits, passengers may be excused for obeying the directions of employes, but in the other case the question is whether the person who assumes to be a passenger has

<sup>1</sup> *Woolsey v. Chicago, etc., R. Co.*, 39 Neb. 798, s. c. 58 N. W. R. 444, 25 L. R. A. 79. The doctrine of the text is well illustrated by the case in which it was held that a superintendent of construction could not impose upon a railroad company the duty of a carrier in favor of a person invited to ride on a construction train. *Evansville, etc., R. Co. v. Barnes*, 137 Ind. 306, s. c. 36 N. E. R. 1092.

<sup>2</sup> *St. Louis, etc., R. Co. v. White*, (Texas Civ. App.) 34 S. W. R. 1042; *Texas, etc., R. Co. v. Black*, 87 Tex. 160, s. c. 27 S. W. R. 118; *Atchison, etc., R. Co. v. Johnson*, 3 Okl. 41, 41 Pac. R. 641; *Files v. Boston, etc., R. Co.*, 149 Mass. 204, s. c. 21 N. E. R. 311; *Lillis v. St. Louis, etc., R. Co.*, 64 Mo. 464; *Frederick v. Marquette, etc., R. Co.*, 37 Mich. 342; *Stone v. Chicago, etc., R. Co.*, 47 Iowa 82; *Hibbard v. New York, etc., R. Co.*, 15 N.

Y. 455; *Candiff v. Louisville, etc., R. Co.*, 42 La. Ann. 477; *Mason v. Missouri, etc., R. Co.*, 27 Kan. 83; *Ohio, etc., R. Co. v. Hatton*, 60 Ind. 12; *Pittsburgh, etc., R. Co. v. Nuzum*, 60 Ind. 533; *Louisville, etc., R. Co. v. Hailey*, 94 Tenn. 383, s. c. 29 S. W. R. 367, 27 L. R. A. 549; *McNamara v. Great Northern, etc., R. Co.*, (Minn.) 63 N. W. R. 726; *Texas, etc., R. Co. v. Hayden*, 6 Texas Civ. App. 745, s. c. 26 S. W. R. 331; *Gulf, etc., R. Co. v. Campbell*, 76 Tex. 174, s. c. 41 Am. & Eng. R. Cas. 100; *Powers v. Boston, etc., R. Co.*, 153 Mass. 188; *International, etc., R. Co. v. Cock*, 68 Tex. 713; *Haase v. Oregon, etc., R. Co.*, 19 Ore. 354; *Canadian, etc., R. Co. v. Johnson*, Montreal L. R. 6 Q. B. 213; *Louisville, etc., R. Co. v. Wilson*, 88 Tenn. 316, s. c. 12 S. W. R. 720, cited in *Illinois, etc., R. Co. v. Meacham*, 91 Tenn. 428, s. c. 19 S. W. R. 232.

actually entered into that relation, and whether he has or not depends upon the authority of the employe to accept him as a passenger.<sup>1</sup> We do not believe, as we have indicated, that a conductor or any other subordinate agent or employe can impose upon a railroad company the duty of a carrier by receiving persons as passengers on trains not intended or used for the transportation of passengers.<sup>2</sup> We know that there is some conflict of authority upon this question,<sup>3</sup> but with great respect for the eminent author to whom we refer, we believe the sound rule is that it is for the officers or superior agents of a railroad company and not for subordinate employes to determine on what trains passengers shall be carried. Rules and regulations can not be made by such employes nor can they annul them. To permit such employes to transform freight, coal oil, construction trains or the like into trains for the conveyance of passengers would be to allow them to impose extraordinary duties and liabilities upon the employer in cases where it is apparent that no such duties or liabilities were assumed or intended to be assumed by the employer.

§ 1581. **Trespassers and intruders.**—It is obvious that a mere intruder or trespasser can not create the relation of carrier and passenger by his own act.<sup>4</sup> The relation can not exist unless the person claiming to be a passenger has been impliedly or expressly received as such by the carrier. There may be a right of action for a wrongful refusal to carry but it does not follow that an action may be maintained in the

<sup>1</sup> *Houston, etc., R. Co. v. Bolling*, 59 Ark. 395, s. c. 43 Am. St. R. 38, citing *Storey v. Ashton*, L. R., 4 Q. B. 476. See generally as to authority of employes. *Illinois, etc., R. Co. v. Latham*, 72 Miss. 33, 16 So. R. R. 757; *San Antonio, etc., R. Co. v. Lynch*, 8 Tex. Civ. App. 513, s. c. 28 S. W. R. 252; *Cooper v. Lake Erie, etc., R. Co.*, 136 Ind. 366, s. c. 36 N. E. R. 272. But see *Chicago, etc., R. Co. v. Frazer*, 55 Kan. 582, s. c. 40 Pac. R. 923.

<sup>2</sup> *Powers v. Boston, etc., R. Co.*, 153

*Mass.* 188; *Gulf, etc., R. Co. v. Campbell*, 76 Tex. 174; *Murch v. Concord R. Co.*, 29 N. H. 9; *Missouri, etc., R. Co. v. Foreman*, 73 Tex. 311, s. c. 11 S. W. R. 326.

<sup>3</sup> *Thompson on Carriers*, 344.

<sup>4</sup> *Berry v. Missouri, etc., R. Co.*, (Mo.) 25 S. W. R. 229; *Austin v. Great Western, etc., R. Co.*, L. R. 2 Q. B. 442; *Toledo, etc., R. Co. v. Brooks*, 81 Ill. 245, 292; *Illinois, etc., R. Co. v. Meacham*, 91 Tenn. 428, s. c. 19 S. W. R. 232.

character of a passenger by one whom the carrier has not accepted as a passenger. A railroad company is, indeed, not bound in its capacity of a carrier to one who has not been received as a passenger by an employe having authority to receive passengers, and hence it is quite clear that it is not liable in the capacity of a carrier to one who enters its trains without right, and as a mere trespasser or intruder. Upon this point there is no substantial diversity of opinion,<sup>1</sup> nor could there well be, since one does not become a passenger until he puts himself in charge of the carrier.<sup>2</sup> Persons who enter the trains of a railroad company through a fraudulent or collusive arrangement with the brakemen or other subordinate employes are not passengers.<sup>3</sup> A person who rides upon an engine in violation of the rules of the company, although he does so upon the invitation of the engineer, is not a passenger.<sup>4</sup> We believe that the rule goes further than asserted in the case

<sup>1</sup> *Chicago, etc., R. Co. v. Field*, 7 Ind. App. 172, s. c. 34 N. E. R. 406; *Pittsburg, etc., R. Co. v. Lightcap*, 7 Ind. App. 249, s. c. 34 N. E. R. 243; *Satterlee v. Groat*, 1 Wend. 272; *O'Brien v. Boston, etc., R. Co.*, 15 Gray 20. One who gets upon a train not intending to pay fare is a trespasser. *Condran v. Chicago, etc., R. Co.*, 67 Fed. R. 522.

<sup>2</sup> *Buswell on Personal Injuries*, § 114; *Schepers v. Union, etc., Co.*, 126 Mo. 665, s. c. 29 S. W. R. 712; *Donovan v. Hartford, etc., R. Co.*, 65 Conn. 201, s. c. 32 Atl. R. 350.

<sup>3</sup> *Brevig v. Chicago, etc., R. Co.*, (Minn.) 66 N. W. R. 401; *Janny v. Great Northern, etc., R. Co.*, (Minn.) 65 N. W. R. 450.

<sup>4</sup> *Wilcox v. San Antonio, etc., R. Co.*, (Tex. Civ. App.) 33 S. W. R. 379, citing *Texas, etc., R. Co. v. Black*, 87 Tex. 160, s. c. 27 S. W. R. 118; *International, etc., R. Co. v. Cooper*, 88 Tex. 607, 32 S. W. R. 517; *Cook v. Houston, etc., Navigation Co.*, 76 Tex.

353, s. c. 13 S. W. R. 475. See, also, *Chicago, etc., R. Co. v. Casey*, 9 Bradw. (Ill. App.) 632; *Chicago, etc., R. Co. v. Michie*, 83 Ill. 427; *Snyder v. Hannibal, etc., R. Co.*, 60 Mo. 413; *Flower v. Pennsylvania R. Co.*, 69 Pa. St. 210; *Duff v. Allegheny, etc., R. Co.*, 91 Pa. St. 458, s. c. 2 Am. & Eng. R. Cas. 1; *Pennsylvania, etc., R. Co. v. Langdon*, 92 Pa. St. 21; *Houston, etc., R. Co. v. Clemmons*, 55 Tex. 88; *Kentucky, etc., R. Co. v. Thomas*, 79 Ky. 160; *Chicago, etc., R. Co. v. Carroll*, 5 Bradw. (Ill. App.) 201, 210. As will be shown hereafter, it is generally held that one who voluntarily places himself in a dangerous position is guilty of such contributory negligence as will defeat a recovery, but we think that where a person voluntarily, and without excuse, goes into a place not provided for passengers, he can not hold a railroad company liable in its capacity of a public carrier of passengers, because he is not a passenger.

cited, for all persons are bound to know that, except, perhaps, in extraordinary and peculiar cases, no one can rightfully take passage on a locomotive. The general doctrine is that a person can take passage on such trains only, and only in such places as the rules of the company provide that passengers shall be carried,<sup>1</sup> and one who does not conform to such rules is ordinarily to be regarded as an intruder or trespasser, and an intruder or trespasser can not impose upon a railroad company the high duty which a carrier owes to its passengers. There may be special and peculiar cases in which persons may ride on trains or in places not provided for passengers generally,<sup>2</sup> but the general rule is that persons must ride on the trains and in the places provided for the carriage of passengers. There is, however, some diversity of opinion as to the rights of a person who has no notice of the rules of the company and is riding by permission of the employes in charge of the train, some of the cases holding that he is not a passenger, others, that he is a passenger.<sup>3</sup> We think it clear, however, that the high duty of a public carrier of passengers does not exist unless the employe has authority to accept the person as a passenger, although the acts of the employe may relieve the person suffered to ride from the imputation of being a trespasser or intruder and impose upon the company the duty of exercising ordinary care. We do not say that such acts of an employe may not impose some duty on the company, but we do give it as our opinion that they do not impose upon the company the duty of using the highest degree of practicable care.<sup>4</sup>

<sup>1</sup> *Pennsylvania, etc., R. Co. v. Books*, 57 Pa. St. 339; *Texas, etc., R. Co. v. Black*, 87 Tex. 160, s. c. 27 S. W. R. 118; *Robertson v. New York, etc., R. Co.*, 22 Barb. 91; *Houston, etc., R. Co. v. Moore*, 49 Tex. 31; *Waterbury v. New York, etc., R. Co.*, 17 Fed. R. 671. See, generally, *Eaton v. Delaware, etc., R. Co.*, 57 N. Y. 382. But see *Dunn v. Grand Trunk, etc., R. Co.*, 58 Me. 187.

<sup>2</sup> *Ohio, etc., R. Co. v. Muhling*, 30 Ill. 9; *Ryan v. Cumberland, etc., R. Co.*, 23 Pa. St. 384; *Gillshannon v. Stony Brook, etc., R. Co.*, 10 Cush. 228.

<sup>3</sup> *Houston, etc., R. Co. v. Moore*, 49 Tex. 31, s. c. 30 Am. R. 98; *Hanson v. Mansfield, etc., R. Co.*, 38 La. Ann. 111; *Alabama, etc., R. Co. v. Yarbrough*, 83 Ala. 238.

<sup>4</sup> *Whitehead v. St. Louis, etc., R. Co.*, 99 Mo. 263, s. c. 6 L. R. A. 409;

§ 1582. Taking passage on freight trains, hand-cars and the like.—As we have elsewhere shown, a person can not, as a general rule, establish the relation of carrier and passenger by entering trains not intended or used for the carriage of passengers. The general rule is that persons can not rightfully take passage on freight, construction, coal trains or the like, nor on hand-cars,<sup>1</sup> but some of the cases hold that permission by the subordinate agents will constitute the person a passenger,<sup>2</sup> but this ruling we regard as erroneous. A railroad company may, of course, carry passengers on its freight trains, and when it does, it assumes, to a somewhat limited extent, the liability of a carrier of passengers,<sup>3</sup> but all persons take the risk incident

Kansas City, etc., R. Co. v. Berry, 53 Kan. 112, s. c. 42 Am. St. R. 278; St. Joseph, etc., R. Co. v. Wheeler, 35 Kan. 185. See, generally, Ohio, etc., R. Co. v. Muhling, 30 Ill. 9, s. c. 81 Am. Dec. 336, and notes.

<sup>1</sup> Cleveland, etc., R. Co. v. Bartram, 11 Ohio St. 457; Whitehead v. St. Louis, etc., R. Co., 99 Mo. 263, s. c. 39 Am. & Eng. R. Cas. 410, 11 S. W. R. 751; Atchison, etc., R. Co. v. Headland, 18 Colo. 477, s. c. 33 Pac. R. 185; Haase v. Oregon, etc., R. Co., 19 Ore. 354, s. c. 24 Pac. R. 238, 44 Am. & Eng. R. Cas. 360; Smith v. Louisville, etc., R. Co., 124 Ind. 394, s. c. 24 N. E. R. 753; Planz v. Boston, etc., R. Co., 157 Mass. 377, s. c. 32 N. E. R. 356; Gulf, etc., R. Co. v. Dawkins, 77 Tex. 228, s. c. 13 S. W. R. 982; International, etc., R. Co. v. Cock, 68 Tex. 713. See Indianapolis, etc., R. Co. v. Kennedy, 77 Ind. 507; Connell v. Mobile, etc., R. Co., (Miss.) 7 So. R. 344; Burlington, etc., R. Co. v. Rose, 11 Neb. 177; Thomas v. Chicago, etc., R. Co., 72 Mich. 355.

<sup>2</sup> Everett v. Oregon, etc., R. Co., 9 Utah 340, s. c. 34 Pac. R. 289; Alabama, etc., R. Co. v. Yarbrough, 83 Ala. 238. See Lucas v. Milwaukee, etc., R. Co., 33 Wis. 41; Lake Shore, etc., R. Co. v. Brown, 123 Ill. 162, s. c.

14 N. E. R. 197. As we have elsewhere suggested the question is not whether the consent of the employe relieves the person who rides on a freight train from the imputation of being a trespasser and imposes on the company no higher duty than that of refraining from inflicting a wanton injury upon him, but the question is as to whether the consent of the employe can impose on the employer the extraordinary duty of a public carrier. It may be true that the consent of the employe is sufficient to require the exercise of ordinary care by the employer and yet not true that it is sufficient to require the highest practicable degree of care such as a carrier owes to one who is a passenger in all that the term implies.

<sup>3</sup> Chicago, etc., R. Co. v. Arnol, 144 Ill. 261, 33 N. E. R. 204, s. c. 2 Am. Negl. Cas. 694; New York, etc., R. Co. v. Doane, 115 Ind. 435, s. c. 17 N. E. R. 913, 3 Am. Neg. Cas. 223, 7 Am. St. R. 451, 1 L. R. A. 157; Burke v. Missouri, etc., R. Co., 51 Mo. App. 491; Hobbs v. Texas, etc., R. Co., 49 Ark. 357; Western, etc., R. Co. v. Turner, 72 Ga. 292, s. c. 53 Am. R. 842; Hutchinson on Carriers, (2d ed.) note 3.

to the mode of travel they adopt, not, however, risks from negligence, and one who travels on a freight train assumes the risks incident to that mode of travel, as, for example, risks of injury from jerks or jolts incident to the movement of freight trains.<sup>1</sup>

### § 1583. Nature of the liability as a carrier of passengers.—

There is a well marked and wide difference between the liability of a railroad company as a common carrier of goods and as a public carrier of passengers. It is not in any sense an insurer of the safety of the persons it undertakes to carry as passengers.<sup>2</sup> The reasons for the distinction have often been given and they are so obvious that it would be unnecessary to dwell upon them even if they had not been so often and so clearly presented.<sup>3</sup> As a railroad carrier of passengers is not an insurer of the safety of passengers it logically follows that where there is no negligence on its part there is no liability.

<sup>1</sup> Louisville, etc., R. Co. v. Bisch, 120 Ind. 549, s. c. 22 N. E. R. 662, 3 Am. Negl. Cas. 257; Woolery v. Louisville, etc., R. Co., 107 Ind. 381; Wallace v. Western, etc., R. Co., 98 N. C. 494, s. c. 2 Am. St. R. 346; Harris v. Hannibal, etc., R. Co., 89 Mo. 233; Crine v. East Tennessee, etc., R. Co., 84 Ga. 651; Reber v. Bond, 38 Fed. R. 822; Lusby v. Atchison, etc., R. Co. 41 Fed. 181.

<sup>2</sup> Gulf, etc., R. Co. v. Warlick, (Indian Ty.) 35 S. W. R. 235; McPad-den v. New York, etc., R. Co., 44 N. Y. 478; Maury v. Talmadge, 2 McLean (C. C.) 157; Sawyer v. Hannibal, etc., R. Co., 37 Mo. 240; Meir v. Pennsylvania Co., 64 Pa. St. 225; Jeffersonville, etc., R. Co. v. Hendricks, 26 Ind. 228; Ladd v. Foster, 31 Fed. R. 827; Palmer v. Delaware, etc., R. Co., 46 Hun 486; Alden v. New York, etc., R. Co., 44 N. Y. 478; Caldwell v. New Jersey, etc., Co., 47 N. Y. 282; Chicago, etc., R. Co. v. Stumps, 69 Ill. 409; Gonzales v. New York, etc., R.

Co., 39 How. Pr. R. 407; Toledo, etc., R. Co. v. Apperson, 49 Ill. 480; Kansas, etc., R. Co. v. Miller, 2 Colo. 442; Bennett v. Dutton, 10 N. H. 481; Gilson v. Jackson, etc., R. Co., 76 Mo. 282, s. c. 12 Am. & Eng. R. Cas. 132; Dougherty v. Missouri, etc., R. Co., 81 Mo. 325, s. c. 21 Am. & Eng. R. Cas. 497; Renneker v. South Carolina R. Co., 20 So. Car. 219, s. c. 18 Am. & Eng. R. Cas. 149; Camden, etc., R. Co. v. Burke, 13 Wend. 611; Ingalls v. Bills, 9 Metcf. 1; Railroad Co. v. Mitchell, 11 Heisk. 400; Christie v. Griggs, 2 Camp. 79; Readhead v. Midland, etc., R. Co., L. R. 2 Q. B. 412.

<sup>3</sup> Crofts v. Waterhouse, 11 Moore 133, s. c. 3 Bing. 319; Christie v. Griggs, 2 Camp. 79; Johnson v. Winona, etc., R. Co., 11 Minn. 296, s. c. 88 Am. Dec. 83. See, generally, Maverick v. Eighth Ave., etc., R. Co., 36 N. Y. 378; Hall v. Connecticut, etc., R. Co., 13 Conn. 319; Fuller v. Naugatuck, etc., R. Co., 21 Conn. 557; Stokes v. Saltonstall, 13 Pet. (U. S.) 181.



But as we shall hereafter see, evidence of the happening of an accident is in many cases sufficient to make a *prima facie* case in favor of an injured passenger, so that, while it is essential to a recovery that there should be negligence on the part of the carrier, it is by no means always necessary that there should be affirmative evidence of negligence, other than the happening of the accident.

§ 1584. **Accidents.**—The term “accident” is often used as meaning an occurrence “to which human fault does not contribute” and the general rule is that there is no liability for injuries resulting from such an occurrence.<sup>1</sup> But the term “accident” is also frequently used as signifying an occurrence to which human fault does contribute.<sup>2</sup> If we take the term “accident” as signifying an occurrence to “which human fault does not contribute,” we may safely affirm that where the defendant is not an insurer there is no liability for injuries resulting from an accident, but if we take the term “accident” as signifying an occurrence to “which human fault contributes” the conclusion stated can not be always justly affirmed. It results from the principles we have stated that as carriers of passengers are not insurers they are not liable for injuries to passengers resulting from an accident in cases where their

<sup>1</sup> *Wabash, etc., R. Co. v. Locke*, 112 Ind. 404; *Terre Haute, etc., R. Co. v. Clem*, 123 Ind. 15, 19; *Loftus v. Union, etc., R. Co.*, 84 N. Y. 455, s. c. 38 Am. R. 533; *Hoag v. Lake Shore, etc., R. Co.*, 85 Pa. St. 293; *Lewis v. Flint, etc., R. Co.*, 54 Mich. 55; *Crafter v. Metropolitan, etc., Co.*, L. R. 1 C. P. 300; *Deyo v. New York, etc., R. Co.*, 34 N. Y. 9; *Aston v. Heaven*, 2 Esp. 533; *Elliott on Roads and Streets*, 611, 636, 637, 1 Am. & Eng. Ency. of Law, (2d ed.) 272. See, also, *Vincent v. Stinehour*, 7 Vt. 62; *Grote v. Chester, etc., Co.*, 2 Exch. 251; *McKinney v. Neil*, 1 McLean (U. S. C. C.) 540; *Metropolitan, etc., R. Co. v. Jackson*, L. R. 3 App. Cas. 193; *Sharp v. Powell*, L. R. 7 C. P.

253; *Hayes v. Michigan, etc., R. Co.*, 111 U. S. 228; *Blyth v. Birmingham, etc., Co.*, 11 Exch. 781. We are not here speaking of the burden of proof in actions against carriers, but of liability where it is shown that there was a pure accident.

<sup>2</sup> *Nave v. Flack*, 90 Ind. 205, s. c. 46 Am. R. 205; *Shearman & Redf. on Negligence*, § 5; *Browne Judicial Interpretation*, 4. See, also, *Huelsenkamp v. Citizens, etc., R. Co.*, 37 Mo. 537; *Laing v. Colder*, 8 Pa. St. 479; *Vaughan v. Taff, etc., R. Co.*, 5 Hurst. & N. 679; *Parrott v. Wells*, 15 Wall. 524; *Brown v. Collins*, 53 N. H. 442; *Ohio, etc., R. Co. v. Lackey*, 78 Ill. 55.

negligence does not produce or concur in producing the accident, but they are liable if their negligence is the proximate cause of the injuries.<sup>1</sup> In other words, if there is no negligence on the part of the railroad carrier there is such an accident as will exonerate it from liability,<sup>2</sup> but if there is negligence it will not be excused solely upon the ground that the injury was the result of an accident. It is obvious that where an injury to a passenger is caused by extraordinary floods, tempests, storms or the like there is no liability on the part of the carrier.<sup>3</sup> But while it is unquestionably true that a railroad carrier of passengers is not liable for injuries caused by extraordinary floods or storms it is also true that where it has knowledge of the effect of such floods or storms, as for instance,

<sup>1</sup> *Davis v. Chicago, etc., R. Co.*, (Wis.) 67 N. W. R. 1132, 67 N. W. R. 16. Upon the question of proximate cause the court cited, *Atkinson v. Goodrich Transportation Co.*, 60 Wis. 141, s. c. 18 N. W. R. 764; *Block v. Milwaukee, etc., R. Co.*, 89 Wis. 371, s. c. 61 N. W. R. 1101; *Barton v. Pepin Co., etc., Society*, 83 Wis. 19, s. c. 52 N. W. R. 1129; *Huber v. LaCrosse, etc., R. Co.*, (Wis.) 66 N. W. R. 708; *Craven v. Smith*, 89 Wis. 119, s. c. 61 N. W. R. 317; *Guinard v. Knapp, etc., Co.*, 90 Wis. 123, s. c. 62 N. W. R. 625. For a good example of the application of the doctrine of proximate cause, see *Chicago, etc., R. Co. v. Bell*, 1 Kan. App. 71, 41 Pac. R. 209. See, also, *Sickles v. Missouri, etc., R. Co.*, (Tex. Civ. App.) 35 S. W. R. 493.

<sup>2</sup> *Chicago, etc., R. Co. v. Stumps*, 69 Ill. 409; *Kansas, etc., R. Co. v. Miller*, 2 Colo. 442; *Carroll v. Staten Island, etc., Co.*, 58 N. Y. 126; *Cleveland, etc., R. Co. v. Curran*, 19 Ohio St. 1; *Alden v. New York, etc., R. Co.*, 26 N. Y. 102; *Knight v. Portland, etc., Co.*, 56 Me. 234; *Perry v. Malarin*, 107 Cal. 363, 40 Pac. R. 489; *Hamilton v. West, etc., R. Co.*, 163 Mass. 199;

*Galveston, etc., R. Co. v. Long*, (Tex.) 36 S. W. R. 485; *Gulf, etc., R. Co. v. Stricklin*, (Tex.) 27 S. W. R. 1093; *Choate v. San Antonio, etc., R. Co.*, (Tex.) 36 S. W. R. 247; *Texas, etc., R. Co. v. Overall*, 82 Tex. 247; *Ham v. Georgia R., etc., Co.*, (Ga.) 24 S. E. R. 152; *Stewart v. Boston, etc., R. Co.*, 146 Mass. 605, s. c. 16 N. E. R. 466.

<sup>3</sup> *Norfolk, etc., R. Co. v. Marshall*, 90 Va. 836, s. c. 20 S. E. R. 823, (citing *Curtis v. Rochester, etc., R. Co.*, 18 N. Y. 534; *Railroad Co. v. Reeves*, 10 Wall. 176; *Gillespie v. St. Louis, etc., R. Co.*, 6 Mo. App. 554; *Long v. Pennsylvania R. Co.*, 147 Pa. St. 343; *Transportation Co. v. Downer*, 11 Wall. 130; *Ingalls v. Bills*, 9 Metc. (Mass.) 1, s. c. 43 Am. Dec. 346); *Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442; *Ellet v. St. Louis, etc., R. Co.*, 76 Mo. 518; *International, etc., R. Co. v. Halloren*, 53 Tex. 46, s. c. 37 Am. R. 744. See, generally, *Brehm v. Great Western, etc., R. Co.*, 34 Barb. 256; *Withers v. North, etc., R. Co.*, 27 L. J. Exch. 417; *Livezey v. Philadelphia*, 64 Pa. St. 106, s. c. 3 Am. R. 578; *Palmer v. Pennsylvania Co.*, 111 N. Y. 488, s. c. 2 L. R. A. 252.

has knowledge that a bridge has been weakened by a freshet, it is bound to exercise care proportionate to the increased danger.<sup>1</sup> If the accident is due to the negligence of the company in constructing or maintaining its road-bed or track it may be liable although a flood concurred in causing the accident.<sup>2</sup> It is the duty of railroad carriers to use proper precautions and due care to provide against danger from such floods and storms as may be expected and the failure to perform this duty may constitute actionable negligence.<sup>3</sup>

**§ 1585. Degree of care required of railroad passenger carriers—General rule.**—It is agreed on all hands that a very high degree of care in regard to road-bed, tracks, cars, equipments and appliances, is required of railroad carriers and that slight negligence is such a breach of duty as will confer upon a passenger who is free from contributory negligence a cause of action.<sup>4</sup> While the adjudged cases all concur in holding

<sup>1</sup> *Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442, 451; (citing *Hardy v. North Carolina, etc., R. Co.*, 74 N. Car. 734); *Great Western, etc., R. Co. v. Braid*, 1 Moore P. C. (N. S.) 101.

<sup>2</sup> *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, s. c. 11 Sup. Ct. R. 859, 4 Am. R. R. & Corp. R. 398; *Bonner v. Wingate*, 78 Tex. 333, s. c. 14 S. W. R. 790; *Texas, etc., R. Co. v. Barron*, 78 Tex. 421, s. c. 14 S. W. R. 698.

<sup>3</sup> Authorities cited in preceding note. *Grote v. Chester, etc., R. Co.*, 2 Exch. 251; *Philadelphia, etc., R. Co. v. Anderson*, 94 Pa. St. 351. See, generally, *People v. Utica, etc., Co.*, 22 Ill. App. 159; *Norris v. Savannah, etc., R. Co.*, 23 Fla. 182; *International, etc., R. Co. v. Halloren*, 53 Tex. 46; *Richardson v. Great Eastern, etc., R. Co.*, L. R. 10 C. P. 486; *Withers v. North, etc., R. Co.*, 27 L. J. N. S. Exch. 417; *Strouss v. Wabash, etc., R. Co.*, 17 Fed. R. 209; *Dorman v. Ames*,

12 Minn. 451; *Miller v. Steam, etc., Co.*, 10 N. Y. 431; *Coosa River, etc., Co. v. Barclay*, 30 Ala. 120.

<sup>4</sup> The decisions upon these questions are very numerous and we do not undertake to cite all of them. *Lehr v. Steinway*, 118 N. Y. 556, 23 N. E. R. 889; *St. Louis, etc., R. Co. v. Sweet*, 60 Ark. 550, s. c. 31 S. W. R. 571; *Clark v. Chicago, etc., R. Co.*, 127 Mo. 197, s. c. 29 S. W. R. 1013; *Hamilton v. Great Falls, etc., R. Co.*, 17 Mont. 334, s. c. 42 Pac. R. 860; *East Tennessee, etc., R. Co. v. Miller*, 95 Ga. 738, s. c. 22 S. E. R. 660; *Fort Worth, etc., R. Co. v. Kennedy*, (Tex.) 35 S. W. R. 335; *Gulf, etc., R. Co. v. Warlick*, (Indian Ty.) 35 S. W. R. 235; *Hanson v. Mansfield, etc., R. Co.*, 38 La. Ann. 111; *Denver, etc., R. Co. v. Hodgson*, 18 Colo. 117, s. c. 31 Pac. R. 954; *Bryan v. Missouri, etc., R. Co.*, 32 Mo. App. 228; *Central, etc., R. Co. v. Perry*, 58 Ga. 461; *Balti-*

that a very high degree of care is required of railroad carriers, and that they are responsible for injuries proximately resulting from slight negligence on their part, there is, nevertheless, much difference in the statements of the rule in the opinions of the courts.<sup>1</sup> It seems to us that the expressions in some of the cases are too strong since they convey the meaning that the carrier is liable absolutely and at all events. We do not doubt that the carrier is bound to exercise the highest practicable degree of care and that the failure to exercise such

more, etc., *R. Co. v. State*, 60 Md. 449; *Moore v. Des Moines, etc.*, R. Co., 69 Iowa 491, s. c. 30 N. W. R. 51, 27 Am. & Eng. R. Cas. 315; *Franklin v. Southern, etc.*, R. Co., 85 Cal. 63, s. c. 24 Pac. R. 723; *Libby v. Maine, etc.*, R. Co., 85 Me. 34, s. c. 26 Atl. 943; *Taylor v. Grand Trunk, etc.*, R. Co., 48 N. H. 304; *Louisville, etc.*, R. Co. *v. Pedigo*, 108 Ind. 481, 8 N. E. R. 627; *Indianapolis, etc.*, R. Co. *v. Horst*, 93 U. S. 291; *Lad v. Foster*, 31 Fed. R. 827; *White v. Fitchburg R. Co.*, 136 Mass. 321, s. c. 18 Am. & Eng. R. Cas. 140; *Chamberlain v. Milwaukee, etc.*, R. Co., 7 Wis. 425; *Trow v. Vermont, etc.*, R. Co., 24 Vt. 487; *Stokes v. Saltonstall*, 13 Pet. 181; *Klein v. Jewett*, 26 N. J. Eq. 474; *Jewett v. Klein*, 27 N. J. Eq. 550; *McClenaghan v. Brock*, 5 Rich. L. (S. Car.) 17; *George v. St. Louis, etc.*, R. Co., 34 Ark. 613, s. c. 1 Am. & Eng. R. Cas. 294; *Carrico v. West Va., etc.*, R. Co., 35 W. Va. 389, s. c. 14 S. E. R. 12, 52 Am. & Eng. R. Cas. 393; *Grand Rapids, etc.*, R. Co. *v. Boyd*, 65 Ind. 526.

<sup>1</sup> We can not comment in detail upon the different forms in which the rule has been expressed, and content ourselves with a reference to the authorities. *Palmer v. Delaware, etc., Co.*, 120 N. Y. 170; *Nashville, etc., R. Co. v. Elliott*, 1 Cold. 611; *Sawyer v. Han-*

*nibal, etc.*, R. Co., 37 Mo. 240; *McClary v. Sioux City, etc.*, R. Co., 3 Neb. 44; *Maury v. Talmadge*, 2 McLean 157; *Pennsylvania Co. v. Roy*, 102 U. S. 451; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291; *Keith v. Pinkham*, 43 Me. 501; *Burns v. Cork, etc.*, R. Co., 13 Irish C. L. R. 543; *Ford v. London, etc., R. Co.*, 2 Fost. & F. 730; *Searle v. Railway Co.*, 32 W. Va. 370; *Bridge v. Grand Junction, etc.*, R. Co., 3 Mees & W. 244; *Virginia, etc., R. Co. v. Sanger*, 15 Gratt. 230; *Toledo, etc., R. Co. v. Conroy*, 68 Ill. 560; *Texas, etc., R. Co. v. Orr*, (Tex.) 31 S. W. R. 696; *Louisville, etc., R. Co. v. Park*, 96 Ky. 580, 29 S. W. R. 455; *St. Louis, etc., R. Co. v. Sweet*, 60 Ark. 550, 31 S. W. 571; *Gulf, etc., R. Co. v. Stricklin*, (Tex.) 27 S. W. R. 1093; *Dillingham v. Wood*, 8 Tex. Civ. App. 71, 27 S. W. R. 1074; *Chicago, etc., R. Co. v. Hazzard*, 26 Ill. 373; *Kellow v. Central, etc., R. Co.*, 68 Iowa 470, s. c. 27 N. W. R. 466; *Mackoy v. Missouri, etc., R. Co.*, 5 McCrary (U. S.) 538; *Fuller v. Naugatuck, etc., R. Co.*, 21 Conn. 557; *Boss v. Providence, etc., R. Co.*, 15 R. I. 149, s. c. 1 Atl. R. 9; *Philadelphia, etc., R. Co. v. Darby*, 14 How. (U. S.) 468, 486; *Hutchinson on Carriers*, § 500, note; *Wharton on Negligence*, §§ 629, 637; *Wood on Railroads*, 1248, 1272.

care constitutes actionable negligence,<sup>1</sup> but we do not believe that a carrier is bound to anticipate and provide against all occurrences which may be conceived by the mind of man. If the highest practicable degree of care is exercised there is no negligence, although there may be an occurrence resulting in injury to a passenger. Every person who travels, no matter by what mode of conveyance, assumes some risk,<sup>2</sup> and if the negligence of the carrier does not add to that risk there is no liability for injuries received by the traveler. The expressions in some of the opinions break down the distinction between common carriers of things and public carriers of passengers, relieve the passenger from all risk and put the entire risk upon the carrier, and this we regard as erroneous. The rule is that where the injury is attributable to a pure accident the carrier is not liable and this is an assertion that there are cases of accidental injuries not due to the act of God, for an injury caused by the act of God will not even constitute a cause of action against an insurer such as common carriers of goods always are where there is no protecting contract.

§ 1586. **Duty as to road-bed and tracks.**—It is unnecessary to dwell at length upon the duty of a railroad carrier respecting its road-bed and tracks, for the general rule requiring a carrier to exercise the highest practicable degree of care obviously extends to and embraces the road-bed and track. Slight negligence in constructing or maintaining the road-bed

<sup>1</sup> *Furnish v. Missouri, etc., R. Co.*, 102 Mo. 438, s. c. 13 S. W. R. 1044; *Bedford, etc., R. Co. v. Rainbolt*, 99 Ind. 551, 559; *VandeVenter v. Chicago, etc., R. Co.*, 26 Fed. R. 32; *Mackoy v. Missouri Pac. R. Co.*, 18 Fed. R. 236; *Dunlap v. Steamboat Reliance*, 2 Fed. R. 249; *Gilson v. Jackson County, etc., R. Co.*, 76 Mo. 282; *Dunn v. Grand Trunk, etc., R. Co.*, 58 Me. 187; *Pittsburg, etc., R. Co. v. Thompson*, 56 Ill. 138; *North Chicago, etc., R. Co. v. Cook*, 145 Ill. 551, s. c. 33 N. E. R. 958; *Chicago, etc., R. Co. v. Arnol*, 144 Ill. 261, s. c. 33 N. E. R. 204; *Oviatt v. Dakota, etc., R. Co.*, 43 Minn. 300, s. c. 45 N. W. R. 436; *Delaware, etc., R. Co. v. Dailey*, 37 N. J. Law 526.

<sup>2</sup> *McKinney v. Neil*, 1 McLean 540. It has been held that where a person with full knowledge becomes a passenger in trains running over a new and unfinished road he assumes the risks incident to travel over such a road. *San Antonio, etc., R. Co. v. Robinson*, 79 Tex. 608, s. c. 15 S. W. R. 584.

and tracks will render the company liable to a passenger without fault who sustains an injury proximately caused by such negligence. It is firmly settled that if the carrier omits to exercise the highest degree of practicable care in making its road-bed, tracks, bridges and the like safe for travel, or omits to exercise that degree of care in keeping them safe for use it is guilty of negligence.<sup>1</sup>

§ 1587. **Duty as to engines, cars, equipments and appliances.**—It is not necessary to do more than say that the rule as to the degree of care and diligence required of railroad carriers imposes upon them the duty of exercising the highest degree of practicable care to provide and keep safe for use engines, cars, equipments and appliances, and to refer to a few of the great number of cases which assert and enforce the general rule.<sup>2</sup> But while there is no substantial diversity of

<sup>1</sup>*Taylor v. Grand Trunk, etc., R. Co.*, 48 N. H. 304; *Pennsylvania, etc., R. Co. v. MacKinney*, 124 Pa. St. 462, s. c. 37 Am. & Eng. R. Cas. 153; *Gonzales v. New York, etc., R. Co.*, 39 How. Pr. (N. S.) 407; *Union, etc., R. Co. v. Hand*, 7 Kan. 380; *Kansas, etc., R. Co. v. Miller*, 2 Colo. 442; *Baltimore, etc., R. Co. v. Noell*, 32 Gratt. 394; *McElroy v. Nashua, etc., R. Co.*, 4 Cush. 400; *Southern, etc., R. Co. v. Walsh*, 45 Kan. 653, s. c. 26 Pac. R. 45; *Libby v. Maine, etc., R. Co.*, 85 Me. 34, s. c. 26 Atl. R. 943; *Peoria, etc., R. Co. v. Reynolds*, 88 Ill. 418; *East Tennessee, etc., R. Co. v. Gurvey*, 12 Lea 46, s. c. 17 Am. & Eng. R. Cas. 568; *Chicago, etc., R. Co. v. Lewis*, 145 Ill. 67, s. c. 33 N. E. R. 960; *McFee v. Vicksburg, etc., R. Co.*, 42 La Ann. 790, s. c. 7 So. R. 720; *Florida, etc., R. Co. v. Webster*, 25 Fla. 394, s. c. 5 So. R. 714; *Kansas, etc., R. Co. v. Lundin*, 3 Colo. 94; *Louisville, etc., R. Co. v. Snyder*, 117 Ind. 435, s. c. 20 N. E. R. 284, 3 L. R. A. 434; *Birmingham v. Rochester,*

*etc., R. Co.*, 59 Hun 583; *Stodder v. New York, etc., R. Co.*, 50 Hun 221, 121 N. Y. 655. As to the duty to fence see *Blair v. Milwaukee, etc., R. Co.*, 20 Wis. 254; *Donnegan v. Erhardt*, 119 N. Y. 468; *Louisville, etc., R. Co. v. Hendricks*, 128 Ind. 462, s. c. 28 N. E. R. 58.

<sup>2</sup>*Taylor v. Pennsylvania Co.*, 50 Fed. R. 755; *Arkansas, etc., R. Co. v. Canman*, 52 Ark. 517, s. c. 13 S. W. R. 280; *Hanson v. Mansfield, etc., R. Co.*, 38 La. Ann. 111, s. c. 58 Am. R. 162; *Nashville, etc., R. Co. v. Jones*, 9 Heisk. 27; *Pershing v. Chicago, etc., R. Co.*, 71 Iowa 561, s. c. 32 N. W. R. 488, 34 Am. & Eng. R. Cas. 405; *Jacobus v. St. Paul, etc., R. Co.*, 20 Minn. 125; *Schultz v. Pacific, etc., R. Co.*, 36 Mo. 13; *East Line, etc., R. Co. v. Smith*, 65 Tex. 167; *Mackey v. Baltimore, etc., R. Co.*, 8 Mackey (D. C.) 282; *Sharp v. Grey*, 9 Bing. 457; *Germain v. Montreal, etc., R. Co.*, 6 Low. Can. 172; *Thatcher v. Great Western, etc., R. Co.*, 4 U. C. C. P. 543; *Topeka, etc., R. Co. v. Higgs*, 38 Kan.

opinion as to the general rule there is conflict of opinion upon one phase of the question, namely, as to what constitutes the highest degree of practicable care. Some of the decisions affirm that the carrier is liable, although the defect is a latent one and undiscoverable, and even though the carrier has used the highest care in making inspections and searching for defects.<sup>1</sup> But reason and authority are opposed to the doctrine of the cases to which we have referred. The true rule is that if the defects are latent and such as can not be discovered by the exercise of the highest degree of care, skill and diligence the carrier is not liable.<sup>2</sup> It is clear that the rule just stated is the sound one, for a different rule would make a carrier of passengers an insurer to the same extent as a common carrier of goods, and as all the well considered cases affirm that a carrier of passengers is not an insurer, it can not be true that a carrier of passengers is liable for injuries caused by defects undiscoverable by human care, diligence and skill. The carrier must make proper inspection and apply appropriate tests. A carrier who omits to make proper inspections and use the neces-

375; *Hall v. Connecticut, etc., R. Co.*, 13 Conn. 319; *Galena, etc., R. Co. v. Fay*, 16 Ill. 558; *Edwards v. Lord*, 49 Me. 279; *Mobile, etc., R. Co. v. Thomas*, 42 Ala. 672; *Peck v. Neil*, 3 McLean 22; *Frish v. Reigle*, 11 Gratt. 697.

<sup>1</sup> *Alden v. New York, etc., R. Co.*, 26 N. Y. 102; *Hegeman v. Western, etc., R. Co.*, 13 N. Y. 9; *Brehm v. Great Western, etc., R. Co.*, 34 Barb. 256.

<sup>2</sup> *Readhead v. Midland, etc., R. Co.*, L. R. 2 Q. B. 412, L. R. 4 Q. B. 379; *Searle v. Laverick*, L. R. 9 Q. B. 122; *Blamires v. Lancashire, etc., R. Co.*, 42 L. J. Ex. 182, L. R. 8 Exch. 283; *Meier v. Pennsylvania R. Co.*, 64 Pa. St. 225; *Nashville, etc., R. Co. v. Jones*, 9 Heisk. 27; *McPadden v. New York, etc., R. Co.*, 44 N. Y. 478; *Carroll v. Staten Island, etc., R. Co.*, 58 N. Y. 126; *Caldwell v. New Jersey, etc., R.*

*Co.*, 47 N. Y. 282; *Fredericks v. Northern, etc., R. Co.*, 157 Pa. St. 103; *Ingalls v. Bills*, 9 Metc. 1; *Toledo, etc., R. Co. v. Beggs*, 85 Ill. 80; *Gilbert v. North London, etc., R. Co.*, 1 Cababe & E. 31; *Dube v. The Queen*, 3 Can. Exch. 147, 30 Can. L. Times (Notes) 30; *Frink v. Potter*, 17 Ill. 406; *Galena, etc., R. Co. v. Fay*, 16 Ill. 558; *Texas, etc., R. Co. v. Buckalew*, (Tex.) 34 S. W. 165; *Anthony v. Louisville, etc., R. Co.*, 27 Fed. R. 724; *Carter v. Kansas City, etc., R. Co.*, 42 Fed. R. 37; *Edwards v. Lord*, 49 Me. 279; *Stockton v. Frey*, 4 Gil. (Md.) 406; *Sawyer v. Hannibal, etc., R. Co.*, 37 Mo. 240; *Frink v. Coe*, 4 G. Greene (Iowa) 555; *Derwort v. Loomer*, 21 Conn. 245; *Crogan v. New York, etc., 18 Alb. L. J.* 70; *Missouri, etc., R. Co. v. Johnson*, 72 Tex. 95; *Neslie v. Second, etc., R. Co.*, 113 Pa. St. 300.

sary tests is guilty of negligence and can not successfully defend upon the ground that the cars, equipments, appliances or the like were purchased of reputable manufacturers.<sup>1</sup>

§ 1588. **Duty to provide and equip trains with modern and improved appliances.**—A railroad carrier is bound to exercise a high degree of care to secure and use the most improved machinery and appliances. It can not, perhaps, be said that there is an absolute duty to adopt the latest improvements, but a very high degree of care in that regard is required.<sup>2</sup> It is not, however, negligence on the part of a railroad company not to adopt new and untried inventions.<sup>3</sup>

§ 1589. **Care required in operation of trains.**—It is the duty of a railroad carrier to provide its trains with a sufficient number of competent persons to properly operate and manage them, but the carrier is not, of course, excused from liability to passengers injured by the negligence of its employes although it may have exercised due care in selecting them. The rule is that for the negligent or tortious acts of its employes a railroad company is liable to a passenger injured by such wrongful acts.<sup>4</sup> It is not necessary to do much more than suggest that

<sup>1</sup> Nashville, etc., R. Co. v. Jones, 9 Heisk. 27; Birmingham v. Rochester, etc., R. Co., 59 Hun 583, s. c. 14 N. Y. Supp. 13; Louisville, etc., R. Co. v. Snyder, 117 Ind. 435, s. c. 3 L. R. A. 434; Robinson v. New York, etc., R. Co., 20 Blatch. 338; Gillenwater v. Madison, etc., R. Co., 5 Ind. 340; Illinois Cent. R. Co. v. Phillips, 49 Ill. 234; Pendleton v. Kinsley, 3 Cliff. 416; Texas, etc., R. Co. v. Hamilton, 66 Tex. 92; Cleveland, etc., R. Co. v. Newell, 104 Ind. 264; McGuire v. Steamship Golden Gate, 1 McAllister 104; Grote v. Chester, etc., R. Co., 2 Exch. 25; Pym v. Great Northern, etc., R. Co., 2 Foster & F. 619. See Francis v. Cockrell, L. R., 5 Q. B. 184. But see *contra*, Grand Rapids,

etc., R. Co. v. Huntley, 38 Mich. 537, s. c. 31 Am. R. 321.

<sup>2</sup> Wallace v. Wilmington, etc., R. Co., 8 Hous. (Del.) 529, s. c. 18 Atl. R. 818; Louisville, etc., R. Co. v. Jones, 83 Ala. 376, s. c. 3 So. R. 902, 34 Am. & Eng. R. Cas. 417; Treadwell v. Whittier, 80 Cal. 574, s. c. 22 Pac. R. 266; Ray Imposed Duties, Passenger Carriers, 59; Hutchinson on Carriers, (2d ed.) § 529.

<sup>3</sup> Steinvreg v. Erie, etc., R. Co., 43 N. Y. 123; Le Barron v. East Boston, etc., Co., 11 Allen 312; Warren v. Fitchburg R. Co., 8 Allen 227; Georgia, etc., R. Co. v. Propst, 83 Ala. 518; Oviatt v. Dakota, etc., R. Co., 43 Minn. 300.

<sup>4</sup> See Injuries to Passengers, *post*,



the rule is that a railroad carrier is under an obligation to exercise due care in all matters relating to the management of the trains on which passengers are carried. Thus, proper signals must be given at places and under circumstances where signals are required for the protection of passengers.<sup>1</sup> Improperly coupling cars,<sup>2</sup> improperly leaving switches open,<sup>3</sup> failure to stop when necessary to avoid danger of collision with

Chapter LXIX. *Dinwiddie v. Louisville, etc., R. Co.*, 9 Lea 309, s. c. 15 Am. & Eng. R. Cas. 483; *Gasway v. Atlanta, etc., R. Co.*, 58 Ga. 216; *Johnson v. Chicago, etc., R. Co.*, 58 Iowa 348, s. c. 12 N. W. R. 329, 8 Am. & Eng. R. Cas. 206; *New Jersey, etc., R. Co. v. Brockett*, 121 U. S. 637, s. c. 7 Sup. Ct. R. 1039; *Smith v. Manhattan, etc., R. Co.*, 18 N. Y. Supp. 759; *Springer, etc., Co. v. Smith*, 16 Lea 498, s. c. 1 S. W. R. 280; *Goddard v. Grand Trunk, etc., R. Co.*, 57 Me. 202; *Stewart v. Brooklyn, etc., R. Co.*, 90 N. Y. 588; *New Orleans, etc., R. Co. v. Jopes*, 142 U. S. 18; *Craker v. Chicago, etc., R. Co.*, 36 Wis. 657; *Ramsden v. Boston, etc., R. Co.*, 104 Mass. 117; *Gillingham v. Ohio, etc., R. Co.*, 35 W. Va. 588, s. c. 14 S. E. R. 243, 14 L. R. A. 798, 51 Am. & Eng. R. Cas. 222; *Carpenter v. Boston, etc., R. Co.*, 97 N. Y. 494, s. c. 49 Am. R. 540; *Crofts v. Waterhouse*, 3 Bing. 319; *Holladay v. Kennard*, 12 Wall. 254; *Way v. Chicago, etc., R. Co.*, 73 Iowa 463, s. c. 35 N. W. R. 525; *Louisville, etc., R. Co. v. Ballard*, 85 Ky. 307, s. c. 3 S. W. R. 530, 7 Am. St. R. 600; *Kansas, etc., R. Co. v. Sanders*, 98 Ala. 293, s. c. 13 So. R. 57, 58 Am. & Eng. R. Cas. 140; *Osborne v. McMasters*, 40 Minn. 103; *Eddy v. Wallace*, 49 Fed. R. 801; *Railroad Co. v. Aspell*, 23 Pa. St. 147.

<sup>1</sup> *Malcom v. Richmond, etc., R. Co.*, 106 N. Car. 63, s. c. 11 S. E. R. 187, 44 Am. & Eng. R. Cas. 379; *Alabama, etc., R. Co. v. Hawk*, 72 Ala. 112, s. c. 18 Am. & Eng. R. Cas. 194; *Thirteenth*

*St., etc., R. Co. v. Boudrou*, 92 Pa. St. 475, s. c. 2 Am. & Eng. R. Cas. 30. Passengers can not, however, found an action upon the failure to give a signal unless, under the circumstances of the particular case, signals are necessary for their protection, for, as a general rule, the law does not require signals to be given for the protection or safety of passengers. Nor can a passenger maintain an action upon the ground that there was a failure to give a signal unless such failure was the proximate cause of his injury. *Chicago, etc., R. Co. v. Bell*, 1 Kan. App. 71, s. c. 41 Pac. R. 209. See, generally, *Central, etc., R. Co. v. Perry*, 58 Ga. 461; *South, etc., R. Co. v. Thompson*, 62 Ala. 494; *Central, etc., R. Co. v. Letcher*, 69 Ala. 106, s. c. 12 Am. & Eng. R. Cas. 115; *Memphis, etc., R. Co. v. Copeland*, 61 Ala. 376.

<sup>2</sup> *Lent v. New York, etc., R. Co.*, 120 N. Y. 467, 31 N. Y. S. R. 538; *Hannibal, etc., R. Co. v. Martin*, 111 Ill. 219; *Cotchett v. Savannah, etc., R. Co.*, 84 Ga. 687. See *Costikyan v. Rome, etc., R. Co.*, 12 N. Y. Supp. 683.

<sup>3</sup> *Louisville, etc., R. Co. v. Kingman*, (Ky.) 35 S. W. R. 264; *Hamilton v. Great Falls, etc., R. Co.*, 17 Mont. 334, 42 Pac. R. 860. See *Redfield v. Oakland, etc., R. Co.*, 110 Cal. 277, 42 Pac. R. 822; *Fogel v. San Francisco, etc., R. Co.*, (Cal.) 42 Pac. R. 565; *Washington v. Spokane, etc., R. Co.*, 13 Wash. 9, 42 Pac. R. 628. In *Koetter v. Manhattan, etc., R. Co.*, 36 N. Y. S. R. 611, the carrier was held

animals or with trains, vehicles or other objects<sup>1</sup> are instances wherein carriers have been held guilty of a breach of duty, and illustrate the general rule. The cases which hold the carrier liable for injuries resulting from improperly stopping or starting trains may also be referred to as illustrations,<sup>2</sup> but risks of injury from jolts and jerks ordinarily incident to the movement of trains are risks which the passenger assumes.<sup>3</sup> So where the law requires trains of one railroad company to come to a stop before crossing the track of another it may be an actionable wrong to attempt to cross without coming to a full stop.<sup>4</sup> So, also, it is an actionable breach of the carrier's duty to leave cars or other things in such a position that injury is caused to passengers thereby.<sup>5</sup> The speed at which trains

liable where a switch was changed by a stranger but the act was done in the presence of a brakeman.

<sup>1</sup>East Tennessee, etc., R. Co. v. Deaver, 79 Ala. 216; Nashville, etc., R. Co. v. Troxlee, 1 Lea 520; East Tennessee, etc., R. Co. v. Bayliss, 75 Ala. 466, 77 Ala. 429; Fordyce v. Jackson, 56 Ark. 584, s. c. 20 S. W. R. 528, 597; Mexican, etc., R. Co. v. Lauricella, 87 Tex. 277, s. c. 47 Am. St. R. 103; Card v. New York, etc., R. Co., 50 Barb. 39; Sullivan v. Philadelphia, etc., R. Co., 30 Pa. St. 234; Chicago, etc., R. Co. v. McAra, 52 Ill. 296; Brown v. New York, etc., R. Co., 34 N. Y. 404; Patchell v. Irish, etc., R. Co., 6 Irish Rep. C. L. 117; Bullock v. Wilmington, etc., R. Co., 105 N. Car. 180.

<sup>2</sup>Condy v. St. Louis, etc., R. Co., 13 Mo. App. 588; Quackenbush v. Chicago, etc., R. Co., 73 Iowa 458, s. c. 35 N. W. R. 523, 34 Am. & Eng. R. Cas. 545; Smith v. Chicago, etc., R. Co., 108 Mo. 243 s. c. 18 S. W. R. 971; Chicago, etc., R. Co. v. Arnol, 144 Ill. 201, s. c. 2 Am. Negl. Cas. 694. Failure to apply brakes may constitute negligence. Tillett v. Norfolk, etc., R. Co.,

(N. Car.) 24 S. E. R. 111. Sudden start may be negligence under some circumstances. Spearman v. California, etc., R. Co., 57 Cal. 432, s. c. 2 Am. Negl. Cas. 170.

<sup>3</sup>Choate v. San Antonio, etc., R. Co., (Tex.) 36 S. W. R. 247.

<sup>4</sup>Grand Rapids, etc., R. Co. v. Ellison, 117 Ind. 234. In the notes to Katzenberger v. Lawo, (90 Tenn. 235) 13 L. R. A. 185, will be found a useful collection of authorities upon the subject of the effect of disobedience of statutes and municipal ordinances. For a case of injury by collision at a crossing of one road by another, see Kellow v. Central, etc., R. Co., 68 Iowa 470, s. c. 27 N. W. R. 466, 21 Am. & Eng. R. Cas. 485.

<sup>5</sup>St. Joseph, etc., R. Co. v. Hedge, 44 Neb. 448, s. c. 62 N. W. R. 887; Tyrrell v. Eastern R. Co., 111 Mass. 546; Farlow v. Kelly, 108 U. S. 288; Kellow v. Central, etc., R. Co., 68 Iowa 470; East Line, etc., R. Co. v. Rushing, 69 Tex. 306, s. c. 6 S. W. R. 834, 34 Am. & Eng. R. Cas. 367; Burke v. Manchester, etc., R. Co., 18 W. R. 694, 22 L. T. R. 442; Walker v. Erie, etc., R. Co., 63 Barb. 260; Cur-

are run is, as a general rule, a matter to be determined by the railroad company, and where there is no statute or municipal ordinance, it is very seldom, indeed, that a charge of negligence can be successfully maintained upon evidence that the rate of speed was very great.<sup>1</sup> There may, however, be peculiar circumstances involved in the particular case which will justify the conclusion that there was negligence in running at a high rate of speed<sup>2</sup> but it would require peculiar circumstances or conditions to make the rate of speed an element of negligence. The violation of a statute or valid municipal ordinance prescribing the rate of speed may be evidence of negligence on the part of the carrier.

**§ 1590. Station buildings—Depots—Negligence in maintaining.**—A railroad company is under a duty to exercise ordinary and reasonable care to so construct and maintain station buildings, or depots and appurtenances, that they shall be safe for use by passengers.<sup>3</sup> The duty respecting the con-

tis v. Central, etc., R. Co., 6 McLean 401. See, general, Montgomery, etc., R. Co. v. Boring, 51 Ga. 582; Virginia, etc., R. Co. v. Sanger, 15 Gratt. 230; Carrico v. West Va., etc., R. Co., 35 W. Va. 389, s. c. 14 S. E. R. 12.

<sup>1</sup> Bishop Non Contract Law, § 1025; Hutchinson on Carriers, § 515, c; 2 Wood on Railroads (Minor's ed.) 1561, note 4. See, also, Houston v. Vicksburg, etc., R. Co., 39 La. Ann. 796, s. c. 2 So. R. 562, 34 Am. & Eng. R. Cas. 76; Terry v. Jewett, 78 N. Y. 338; Chicago, etc., R. Co. v. Lewis, 145 Ill. 67, s. c. 33 N. E. R. 960, 58 Am. & Eng. R. Cas. 126; East Tennessee, etc., R. Co. v. Winters, 85 Tenn. 240, s. c. 1 S. W. R. 790. See, generally, Cleveland, etc., R. Co. v. Newell, 75 Ind. 542, 544; Wilds v. Hudson River R. Co., 29 N. Y. 315.

<sup>2</sup> Louisville, etc., R. Co. v. Pedigo, 108 Ind. 481, 483; Mitchell v. Southern Pac. R. Co., 87 Cal. 62, s. c. 25 Pac. R. 245; Louisville, etc., R. Co. v.

Jones, 108 Ind. 551, 572; Indianapolis, etc., R. Co. v. Hall, 106 Ind. 371. Terre Haute, etc., R. Co. v. Clark, 73 Ind. 168; O'Toole v. Central Park, etc., R. Co., 35 N. Y. S. R. 591. In Chesapeake, etc., R. Co. v. Clowes, (Va.) 24 S. E. R. 833, it was held error to charge that it was negligence to run a train at an unusually high rate of speed. See, generally, Schexnadrye v. Texas, etc., R. Co., 46 La. Ann. 248, s. c. 49 Am. St. R. 321.

<sup>3</sup> Burgess v. Great Western, etc., R. Co., 6 C. B. N. S. 923; Bennett v. Railroad Co., 102 U. S. 577; McDonald v. Chicago, etc., R. Co., 26 Iowa 124; Louisville, etc., R. Co. v. Lucas, 119 Ind. 583; Liscomb v. New Jersey, etc., R. Co., 6 Lans. 75; Toledo, etc., R. Co. v. Grush, 67 Ill. 262. Hutchinson on Carriers, §§ 576, 577; Bishop Non Contract Law, § 1086. See Cincinnati, etc., Co. v. Peters, 80 Ind. 168, 3 Am. Negl. Cas. 133, and authorities cited p. 142.

struction and maintenance of station buildings is not so rigorous as that imposed upon railroad carriers in relation to road-bed, tracks, cars, appliances and the like. Some of the cases seem to lose sight of the difference between the duty respecting station buildings and that respecting means and modes of conveyance, but the well reasoned cases recognize the distinction and affirm that a railroad company that exercises ordinary care in constructing and maintaining station buildings and appurtenances in a reasonably safe condition for use is not guilty of negligence.<sup>1</sup> There is really no valid reason why a railroad company should be held to a higher degree of care in maintaining its station buildings than that to which an individual owner of buildings used for ordinary business purposes is held. The reasoning of the cases<sup>2</sup> which laid the foundation for the strict American doctrine as to the degree of care required of carriers using steam as a motive power can not, it is obvious, have any application to buildings and structures prepared for the use of travelers. Modes and means of conveyance employed by railroad companies do require "powerful and dangerous agencies," but buildings and structures in themselves neither require the employment of "dangerous and powerful agencies" nor possess unusual elements of danger. The duty to exercise ordinary care to maintain station

<sup>1</sup> *Pennsylvania Co. v. Marion*, 104 Ind. 239, s. c. 7 L. R. A. 687, 27 Am. & Eng. R. Cas. 132; *Taylor v. Pennsylvania R. Co.*, 50 Fed. R. 755; *Batton v. South, etc., R. Co.*, 77 Ala. 591, s. c. 23 Am. & Eng. R. Cas. 514, 54 Am. R. 80; *Moreland v. Boston, etc., R. Co.*, 141 Mass. 31; *Pendleton, etc., R. Co. v. Shires*, 18 Ohio St. 255; *Texas, etc., R. Co. v. Brown*, 78 Tex. 397; *Hayman v. Pennsylvania R. Co.*, 118 Pa. St. 508, s. c. 11 Atl. R. 815; *Bernhardt v. Western, etc., R. Co.*, 159 Pa. St. 360, s. c. 28 Atl. R. 140; *Cazman v. Fitchburg R. Co.*, (Mass.) 37 N. E. R. 311; *Laffin v. Buffalo, etc., R. Co.*, 106 N. Y. 136; *Chicago, etc., R. Co. v. Mahara*, 47 Ill. App. 208; *Owen v. Great Western, etc., R. Co.*, 46 L. J. Q. B. 486. If care is used to provide reasonably safe platforms the carrier is not liable. *Stokes v. Suffolk, etc., R. Co.*, 107 N. C. 178, 11 S. E. R. 991; *Michigan, etc., R. Co. v. Coleman*, 28 Mich. 440; *Hanrahan v. Manhattan, etc., R. Co.*, 53 Hun 420. The general statement in *Louisville, etc., R. Co. v. Lucas*, 119 Ind. 583, as to the degree of care required in maintaining station buildings is erroneous. See *Ray Imposed Duties, Passenger Carriers*, 95.

<sup>2</sup> Such, for example, as *Philadelphia, etc., R. Co. v. Derby*, 14 How. 468.

buildings and appurtenances in a reasonably safe condition extends to platforms, approaches, urinals and the like.<sup>1</sup> There is a slight conflict in the authorities as to whether a railroad company is bound to light its station buildings,<sup>2</sup> but it seems clear to us that where the use of the buildings is such that ordinary care requires that they be lighted, then it is the duty of the company to provide them with lights so that they will be reasonably safe for use by passengers who themselves exercise ordinary care. As care to be ordinary care must, in legal contemplation, be such care as is proportionate to the danger, it follows that, with very rare exceptions, it may be affirmed that, as matter of law, there is a duty to light railroad station buildings and such appurtenances as travelers may rightfully

<sup>1</sup> *Weston v. New York, etc., R. Co.*, 73 N. Y. 595; *Brassell v. New York, etc., R. Co.*, 84 N. Y. 241; *Louisville, etc., R. Co. v. Wolfe*, 80 Ky. 82, s. c. 5 Am. & Eng. R. Cas. 625; *St. Louis, etc., R. Co. v. Cantrell*, 37 Ark. 519, s. c. 8 Am. & Eng. R. Cas. 198; *Chicago, etc., R. Co. v. Scates*, 90 Ill. 586; *Missouri, etc., R. Co. v. Neiswanger*, 41 Kan. 621; *McKone v. Michigan, etc., R. Co.*, 51 Mich. 601; *Gulf, etc., R. Co. v. Glenk, (Tex.)* 30 S. W. R. 278; *Baltimore, etc., R. Co. v. Chambers, (Md.)* 32 Atl. R. 201; *Texas, etc., R. Co. v. Hudman*, 8 Tex. C. App. 309, 28 S. W. R. 388; *Christie v. Chicago, etc., R. Co.*, (Minn.) 63 N. W. R. 482; *Kentucky, etc., Co. v. McKinney*, 9 Ind. App. 213, s. c. 3 Am. Neg. Cas. 30; *Turner v. Vicksburg, etc., R. Co.*, 37 La. Ann. 648, s. c. 3 Am. Negl. Cas. 526; *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *Union, etc., R. Co. v. Sue*, 25 Neb. 772; *Hulbert v. New York, etc., R. Co.*, 40 N. Y. 145; *Warren v. Fitchburg, etc., R. Co.*, 8 Allen 227; *Lake Shore, etc., R. Co. v. Ward*, 135 Ill. 511, 26 N. E. R. 520, 35 Ill. App. 423; *Alexandria, etc., R. Co. v. Herndon*, 87 Va. 193; *Gaynor v. Old Colony R. Co.*, 100 Mass.

208; *Burgess v. Great Western, etc., R. Co.*, 6 C. B. N. S. 923.

<sup>2</sup> *Fordyce v. Merrill*, 49 Ark. 277, s. c. 2 Am. Neg. Cas. 144; *Buenemann v. St. Paul, etc., R. Co.*, 32 Minn. 390, s. c. 18 Am. & Eng. R. Cas. 153; *Peniston v. Chicago, etc., R. Co.*, 34 La. Ann. 777; *Louisville, etc., Co. v. Lucas*, 119 Ind. 583; *Waller v. Missouri, etc., R. Co.*, 1 Mo. App. R. 56, 59 Mo. App. 410; *Reynolds v. Texas, etc., R. Co.*, 37 La. Ann. 694, s. c. 3 Am. Neg. Cas. 528; *Nicholson v. Lancashire, etc., R. Co.*, 3 Hurls. & C. 534; *Martin v. Great Northern, etc., R. Co.*, 16 C. B. 179; *Forsyth v. Boston, etc., R. Co.*, 103 Mass. 510; *Beard v. Connecticut, etc., R. Co.*, 48 Vt. 101; *Alabama, etc., R. Co. v. Arnold*, 80 Ala. 600; *Alabama, etc., R. Co. v. Arnold*, 84 Ala. 159; *Jarvis v. Brooklyn, etc., R. Co.*, 133 N. Y. 623; *Patten v. Chicago, etc., R. Co.*, 32 Wis. 524; *Quaife v. Chicago, etc., R. Co.*, 48 Wis. 513; *Moses v. Louisville, etc., R. Co.*, 39 La. Ann. 649, s. c. 30 Am. & Eng. R. Cas. 556, 4 Am. St. R. 231; *Wentworth v. Eastern, etc., R. Co.*, 143 Mass. 248. But see *Reed v. Axtell*, 84 Va. 231; *Wallace v. Wilmington, etc., R. Co.*, 8 Hous. (Del.) 529, s. c. 18 Atl. R. 818.

use. But this duty does not require that lights be provided at unusual places,<sup>1</sup> or places where travelers have no right to go.

**§ 1591. Duty to protect passengers from injury by third persons.**—The rule affirmed by the weight of authority is that a railroad carrier is bound to exercise a high degree of care to protect its passengers from injury by third persons.<sup>2</sup> But while it is incumbent on the carrier to exercise that degree of care it is not liable if such care is used, for there is no liability unless there is negligence.<sup>3</sup> Whether the care the law requires was exercised must generally be determined upon the facts of the particular case.

**§ 1592. Termination of the relation of carrier and passenger.**—The general rule is that the relation of carrier and passenger does not terminate until the passenger has alighted from the train and left the place where passengers are discharged.<sup>4</sup> But while in the depot the degree of care is not as

<sup>1</sup> Missouri, etc., R. Co. v. Miller, 8 Tex. C. App. 241, 27 S. W. R. 905; *Gunderman v. Missouri, etc., R. Co.*, 58 Mo. App. 370.

<sup>2</sup> Texas, etc., R. Co. v. Johnson, 2 Tex. App. (Civil Cas.) 154; *Atchison, etc., R. Co. v. Weber*, 33 Kan. 543, s. c. 6 Pac. R. 877, 21 Am. & Eng. R. Cas. 418; *King v. Ohio, etc., R. Co.*, 22 Fed. R. 413; *Pittsburgh, etc., R. Co. v. Hinds*, 53 Pa. St. 512; *Eads v. Metropolitan, etc., R. Co.*, 43 Mo. App. 536; *Winnegar v. Central, etc., R. Co.*, 85 Ky. 547, s. c. 4 S. W. R. 237; *Spohn v. Missouri, etc., R. Co.*, 101 Mo. 417, s. c. 14 S. W. R. 880; *Sira v. Wabash, etc., R. Co.*, 115 Mo. 127, s. c. 21 S. W. R. 905; *Illinois, etc., R. Co. v. Minor*, 69 Miss. 710, s. c. 11 So. R. 101, 16 L. R. A. 627; *Pittsburg, etc., R. Co. v. Pillow*, 76 Pa. St. 510; *New Orleans, etc., R. Co. v. Burke*, 53 Miss. 200; *Britton v. Atlanta, etc., R. Co.*, 88 N. Car. 536, s. c. 43 Am. R. 749; *Southern, etc., R. Co. v. Rice*,

38 Kan. 398, s. c. 16 Pac. R. 817; *Batton v. South, etc., R. Co.*, 77 Ala. 591, s. c. 54 Am. R. 80.

<sup>3</sup> *Illinois, etc., R. Co. v. Handy*, 63 Miss. 609; *Putnam v. Broadway, etc., R. Co.*, 15 Abb. Pr. R. (N. S.) 383; *Felton v. Chicago, etc., R. Co.*, 69 Iowa 577, s. c. 29 N. W. R. 618, 27 Am. & Eng. R. Cas. 229; *Chicago, etc., R. Co. v. Pillsbury*, 123 Ill. 9, s. c. 14 N. E. R. 22, 31 Am. & Eng. R. Cas. 24.

<sup>4</sup> *McKimble v. Boston, etc., R. Co.*, 139 Mass. 542, s. c. 2 N. E. R. 97, 21 Am. & Eng. R. Cas. 213; *St. Louis, etc., R. Co. v. Finley*, 79 Tex. 85, s. c. 15 S. W. R. 266; *Central, R. Co. v. Whitehead*, 74 Ga. 441; *Timpson v. Manhattan, etc., Co.*, 52 Hun 489; *Imhoff v. Chicago, etc., R. Co.*, 20 Wis. 344; *Jeffersonville, etc., R. Co. v. Parmalee*, 51 Ind. 42; *Gaynor v. Old Colony R. Co.*, 100 Mass. 208; *Burnham v. Wabash, etc., R. Co.*, 91 Mich. 523, s. c. 52 N. W. R. 14; *Ormond v. Hayes*, 60 Tex. 180.

high as that resting on the carrier while the passenger is on the train.<sup>1</sup> Nor does the duty extend beyond a reasonable time in which to leave the depot or alighting place, but what is a reasonable time must often depend upon the circumstances of the particular case. Where a passenger leaves the train and voluntarily walks along the track the relation ceases.<sup>2</sup> The fact that a passenger of the company is intoxicated does not increase its duty to him after he leaves its depot.<sup>3</sup> A person who leaves his place as a passenger to assist an employe of the company, but returns to it, does not lose his rights as a passenger,<sup>4</sup> nor does one who leaves the train for the purpose of being transferred to another train.<sup>5</sup> Nor does one lose his right as a passenger where he temporarily leaves the train for a purpose connected with his journey and remains on the premises of the company.<sup>6</sup>

<sup>1</sup> *Ante*, § 1590.

<sup>2</sup> *Finnegan v. Chicago, etc., R. Co.*, 48 Minn. 378, s. c. 51 N. W. R. 122; *Buckley v. Old Colony R. Co.*, 161 Mass. 26, s. c. 36 N. E. R. 583; *Allerton v. Boston, etc., R. Co.*, 146 Mass. 241, s. c. 15 N. E. R. 621. See *Cincinnati, etc., R. Co. v. Carper*, 112 Ind. 26, s. c. 13 N. E. R. 122, 14 N. E. R. 352, 2 Am. St. R. 144, 3 Am. Negl. Cas. 186; *Jones v. Boston, etc., R. Co.*, 163 Mass. 245, s. c. 39 N. E. R. 1019, 11 Am. R. & Corp. Rep. (Lewis) 625; *Chicago, etc., R. Co. v. Barrett*, 16 Ill. App. 17; *Drew v. Central, etc., R. Co.*, 51 Cal. 425; *Knight v. Portland, etc., R. Co.*, 56 Me. 234.

<sup>3</sup> *Rozwadosfskie v. International, etc., R. Co.*, 1 Tex. Civ. App. 487, s. c. 20 S. W. R. 872.

<sup>4</sup> *Cumberland, etc., R. Co. v. Myers*, 55 Pa. St. 288. See *Brown v. Scaboro*, 97 Ala. 316, s. c. 12 So. R. 289, 58 Am. & Eng. R. Cas. 364.

<sup>5</sup> *Dwinelle v. New York, etc., R. Co.*, 120 N. Y. 117, s. c. 24 N. E. R. 319, 44 Am. & Eng. R. Cas. 384. See *Parsons v. New York, etc., R. Co.*, 113 N. Y. 355, s. c. 21 N. E. R. 145, 3 L. R. A. 683; *State v. Grand Trunk, etc., R. Co.*, 58 Me. 176.

<sup>6</sup> *Atchison, etc., R. Co. v. Shean*, 18 Colo. 368, s. c. 33 Pac. R. 108; *Jeffersonville, etc., R. Co. v. Riley*, 39 Ind. 568. See, generally, *Central, etc., R. Co. v. Peacock*, 69 Md. 257; *Dodge v. Boston, etc., Co.*, 148 Mass. 207, s. c. 19 N. E. R. 373, 2 L. R. A. 83.

## CHAPTER LXVII.

### TICKETS, FARES AND PASSES.

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| <p>§ 1593. Tickets and fares—Generally.</p> <p>1594. Ticket as evidence of passenger's rights—Loss of ticket.</p> <p>1595. Stop-over privileges.</p> <p>1596. Through tickets—Coupons.</p> <p>1597. Round trip tickets.</p> <p>1598. Limited tickets.</p> <p>1599. Non-transferable tickets.</p> <p>1600. Commutation and mileage tickets.</p> <p>1601. Excursion tickets.</p> <p>1602. Conductor's checks.</p> <p>1603. Fare paid on train.</p> <p>1604. When person riding on pass is a passenger and when not.</p> <p>1605. Drivers riding on passes.</p> <p>1606. Duty to person riding on pass.</p> | <p>§ 1607. Conditions in passes.</p> <p>1608. Validity of stipulation exempting carrier from liability for negligence.</p> <p>1609. Injury to person riding on pass.</p> <p>1610. Person other than the one entitled to use a pass riding thereon—Fraud.</p> <p>1611. Contract to give passes.</p> <p>1612. Interstate commerce law.</p> <p>1613. Statutes prohibiting the granting of passes.</p> <p>1614. Rights of persons holding passes to be carried in sleeping and parlor cars.</p> <p>1615. Baggage of person riding on pass.</p> |
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§ 1593. Tickets and fares—Generally.—According to the generally accepted doctrine a ticket, in the ordinary form, is a voucher, token or receipt, rather than a contract, adopted for convenience, to show that the passenger has paid his fare from the place or station named therein as the place of departure to the place or station named therein as the place of destination.<sup>1</sup>

<sup>1</sup> *Quimby v. Vanderbilt*, 17 N. Y. New York, etc., R. Co., 23 Fed. R. 306, s. c. 72 Am. Dec. 469; *Rawson v.* 765; *Johnson v. Concord R. Co.*, 46 N. Pennsylvania R. Co., 48 N. Y. 212, s. H. 213, s. c. 88 Am. Dec. 199; *Gordon v. Manchester, etc., R. Co.*, 52 N. H. 596, s. c. 13 Am. R. 97; *Brown v. Eastern R. Co.*, 11 Cush. (Mass.) 97; *Logan v. Hannibal, etc., R. Co.*, 77 Mo. 663, s. c. 12 Am. & Eng. R. Cas. 140; *Sears v. Eastern R. Co.*, 14 Allen



Fare is "the price of passage or the sum paid or to be paid for carrying the passenger."<sup>1</sup> A ticket is evidence of a contract to carry and the right to passage, but the contract itself is implied by law except in so far as it is expressed in the ticket. Upon the theory that it is not itself the written contract, parol evidence has been held admissible to prove the terms of the contract in fact entered into between the company and the passenger,<sup>2</sup> or the representations made by the agent, at the

(Mass.) 433; *Burnham v. Grand Trunk R. Co.*, 63 Me. 298, s. c. 18 Am. R. 220; *Kansas City, etc., R. Co. v. Rodebaugh*, 38 Kan. 45, s. c. 5 Am. St. R. 715, and note; 25 Am. & Eng. Encyc. of L., 1074. But, while it is true that tickets seldom constitute or express the whole contract and that the law and the reasonable rules and regulations of the company must usually be looked to, yet we think that a ticket may be both a receipt and a contract, and, in so far as it is a contract its terms should be held binding. Many of the cases above cited hold that a mere notice limiting liability or the like printed on the ticket is not binding because it is not a contract, but when shown to be part of the contract, if it is such as the law permits, we think it is binding, and there can, we think, be no doubt that such is the case as to terms and stipulations in the contract part of the ticket, especially where it is signed by the purchaser. See *Central Trust Co. v. East Tenn., etc., R. Co.*, 65 Fed. 332; *Melville v. Baltimore, etc., R. Co.*, 2 Mackey (D. C.) 63; *Richmond, etc., R. Co. v. Ashby*, 79 Va. 130, s. c. 52 Am. R. 620; *Mosher v. St. Louis, etc., R. Co.*, 127 U. S. 390, s. c. 8 Sup. Ct. R. 1324; *Burke v. Southeastern R. Co.*, L. R. 5 C. P. Div. 1; *Steers v. Liverpool, etc., R. Co.*, 57 N. Y. 1, s. c. 15 Am. R. 453; *Dietrich v. Pennsylvania R. Co.*, 71 Pa. St. 432, s. c. 10 Am. R. 711,

715; *Johnson v. Concord R. Co.*, 46 N. H. 213, s. c. 88 Am. Dec. 199; *Gulf, etc., R. Co. v. Daniels*, (Tex. Civ. App.) 29 S. W. R. 426; *Fonseca v. Cunard, etc., Co.*, 153 Mass. 553, s. c. 27 N. E. R. 665, 12 L. R. A. 340; *Terre Haute, etc., R. Co. v. Fitzgerald*, 47 Ind. 79. We think it is generally understood by the traveling public that it is the duty of a ticket agent to sell tickets and not to make contracts for transportation apart from such tickets, that the ticket is regarded as the contract, in so far at least as the terms are therein expressed, and that the custom to print notices, conditions and limitations therein is so well known that purchasers might well be required to take notice thereof. There is much force in the reasoning of Ross, J., in *Callaway v. Mellett*, (Ind. App.) 44 N. E. Rep. 198, and in the article on "Tickets" in 1 Har. Law Rev., 17, showing that unused tickets are not mere vouchers or receipts and that the accepted definition applies with more exactness to a canceled ticket. See, also, *Sleeper v. Pennsylvania R. Co.*, 100 Pa. St. 259, s. c. 9 Am. & Eng. R. Cas. 291, 45 Am. R. 380; *Duling v. Philadelphia, etc., R. Co.*, 66 Md. 120, s. c. 6 Atl. R. 592.

<sup>1</sup>Per Marvin, J., in *Chase v. New York Cent. R. Co.*, 26 N. Y. 523, 525.

<sup>2</sup>See authorities cited in the first note to this section.

time the ticket was purchased, as to stop-over privileges or the like.<sup>1</sup> But the terms of the contract, or certain conditions and limitations which enter into and form part of the contract, are frequently written or printed on the face of the ticket, and where such is the case we think the better rule is that a passenger has no right to rely upon the representations of an agent or conductor which are contrary to its express limitations and conditions.<sup>2</sup> A railroad ticket is not negotiable as commercial paper, although it may be transferable unless otherwise provided, and a person who purchases a ticket in good faith and for a valuable consideration from one who has stolen or fraudulently obtained it from the company does not thereby acquire a good title.<sup>3</sup> As a general

<sup>1</sup> New York, etc., R. Co. v. Winter's Admr., 143 U. S. 60, s. c. 12 Sup. Ct. R. 356; Robinson v. Louisville, etc., R. Co., 2 Lea (Tenn.) 594; Van Kirk v. Pennsylvania R. Co., 76 Pa. St. 66, s. c. 18 Am. R. 404; Burnham v. Grand Trunk R. Co., 63 Me. 298; Pittsburgh, etc., R. Co. v. Nuzum, 50 Ind. 141, s. c. 19 Am. R. 703; Murdock v. Boston, etc., R. Co., 137 Mass. 293.

<sup>2</sup> Boice v. Hudson River R. Co., 61 Barb. (N. Y.) 611; McClure v. Philadelphia, etc., R. Co., 34 Md. 532; Pennington v. Philadelphia, etc., R. Co., 62 Md. 95. See, also, Melville v. Baltimore, etc., R. Co., 2 Mackey (D. C.) 63; Richmond, etc., R. Co. v. Ashby, 79 Va. 130, s. c. 56 Am. R. 620; Central Trust Co. v. East Tenn., etc., R. Co., 65 Fed. R. 332; Drummond v. Southern Pac. R. Co., 7 Utah 118; Boylan v. Hot Springs R. Co., 132 U. S. 146, s. c. 10 Sup. Ct. R. 50; Howard v. Chicago, etc., R. Co., 61 Miss. 194. Although, as we have seen, there are many cases which hold that the purchaser of a ticket is not expected to look for a notice limiting liability or the like on an ordinary ticket and is not bound thereby, in the absence of knowledge of such notice, yet where

he has such knowledge and accepts and uses the ticket without objection we think he is bound thereby, and so we think he should expect and take notice of reasonable regulations of transportation and conditions and limitations on special tickets or tickets purchased at a reduced rate. Many of the cases involving questions as to rights under limited tickets, stop-over privileges and the like either decide or assume this to be the law. See Boston, etc., R. Co. v. Proctor, 1 Allen (Mass.) 267, s. c. 79 Am. Dec. 729; Shedd v. Troy, etc., R. Co., 40 Vt. 88; Johnson v. Philadelphia, etc., R. Co., 63 Md. 106; Edwards v. Lake Shore, etc., R. Co., 81 Mich. 364; Bowers v. Pittsburgh, etc., R. Co., 158 Pa. St. 302; Nolan v. New York, etc., R. Co., 9 Jones & S. 541; McRea v. Wilmington, etc., R. Co., 88 N. Car. 526, s. c. 43 Am. R. 745; Farewell v. Grand Trunk R. Co., 15 U. C. C. P. 427; Boylan v. Hot Springs R. Co., 132 U. S. 146, s. c. 10 Sup. Ct. R. 50; Missouri, etc., R. Co. v. Murphy, (Tex. Civ. App.) 35 S. W. R. 66.

<sup>3</sup> Frank v. Ingalls, 41 Ohio St. 560, s. c. 21 Am. & Eng. R. Cas. 277. But see 1 Harv. Law Rev., 17. So where

rule, one who purchases a through ticket is bound to pursue the usual and direct route over the company's road and is not entitled to go by way of a longer and more circuitous line owned by the same company,<sup>1</sup> nor is he entitled to stop over on the way unless given that privilege.<sup>2</sup> So, a ticket for passage in one direction, that is, from a specified place of departure to a specified destination, is not good for a reverse trip, or passage in the opposite direction.<sup>3</sup> The issuance of a ticket for passage from one place to another does not necessarily imply that all passenger trains will stop at both places, contrary to the rules of the company, even where it is marked "good for passenger trains only," and it is the duty of the purchaser, before taking passage on any particular train, to inquire and ascertain that it does stop.<sup>4</sup> Railroad carriers of passengers, like common carriers of freight, have no right to exact unreasonable compensation or rates of toll,<sup>5</sup> but it is said that "un-

the holder has obtained the ticket by fraud. *Brown v. Missouri, etc., R. Co.*, 64 Mo. 536.

<sup>1</sup> *Bennett v. New York Central, etc., R. Co.*, 69 N. Y. 594, s. c. 25 Am. R. 250; *Illinois Cent. R. Co. v. Billington, (Ky.)* 30 S. W. R. 885; *Church v. Chicago, etc., R. Co.*, (S. Dak.) 60 N. W. R. 854.

<sup>2</sup> *Roberts v. Koehler*, 30 Fed. R. 94; *Drew v. Central Pac. R. Co.*, 51 Cal. 425; *post*, § 1595. See, also, *Pennsylvania R. Co. v. Parry*, 55 N. J. L. 551, s. c. 27 Atl. R. 914.

<sup>3</sup> *Kelley v. Boston, etc., R. Co.*, 67 Me. 163, s. c. 24 Am. R. 19, and note; *Coleman v. New York, etc., R. Co.*, 106 Mass. 160. See, also, *Pennsylvania R. Co. v. Bray*, 125 Ind. 229, s. c. 25 N. E. R. 439. But it may be good from an intermediate point to the destination, that is, the holder may commence his journey between the specified place of departure and place of destination and go over the portion of the route, in a continuous trip, from such intermediate point to the desti-

nation specified. *Auerbach v. New York Central, etc., R. Co.*, 89 N. Y. 281, 284; *Georgia R. Co. v. Clarke, (Ga.)* 25 S. E. R. 368.

<sup>4</sup> *Ohio, etc., R. Co. v. Swarthout*, 67 Ind. 567, s. c. 33 Am. R. 104; *Ohio, etc., R. Co. v. Applewhite*, 52 Ind. 540, 546; *Chicago, etc., R. Co. v. Bills*, 104 Ind. 13, s. c. 3 N. E. R. 611; *Pittsburgh, etc., R. Co. v. Nuzum*, 50 Ind. 141, s. c. 19 Am. R. 703; *Logan v. Hannibal, etc., R. Co.*, 77 Mo. 663; *Trotlinger v. East Tenn., etc., R. Co.*, 11 Lea (Tenn.) 533; *Martindale v. Kansas City, etc., R. Co.*, 60 Mo. 508; *Texas, etc., R. Co. v. Ludlam, (Tex.)* 26 S. W. R. 430; *Dietrich v. Pennsylvania, etc., R. Co.*, 71 Pa. St. 432, s. c. 10 Am. R. 711; *Pittsburgh, etc., R. Co. v. Lightcap*, 7 Ind. App. 249, s. c. 34 N. E. R. 243. See *ante*, vol. I, § 200; *New York, etc., R. Co. v. Feely*, 163 Mass. 205, 40 N. E. R. 20. But compare *Richmond, etc., R. Co. v. Ashley*, 79 Va. 130, s. c. 52 Am. R. 620.

<sup>5</sup> *Stone v. Illinois Cent. R. Co.*, 116 U. S. 347, s. c. 6 Sup. Ct. R. 348, 388,

less prohibited from doing so by statute there seems to be no good reason why a railway company which has established uniform and reasonable rates of fares at which all may purchase tickets, may not for special reasons sell certain persons tickets at less rate. So long as it may issue passes and transport persons free, if it chooses to do so, there seems to be no valid reason why it may not sell a person a ticket for half price, without incurring any liability therefor to others."<sup>1</sup> It has even been held, where a statute required railroad companies to give all persons reasonable and equal terms, that a student who had been sold a season ticket for a reasonable price could not complain because other students had been sold similar tickets for half price.<sup>2</sup> A state has power to regulate, within its own jurisdiction, the rates of fare and charges for the transportation of passengers to and from points within the state, at least in the absence of any provision in the company's charter relinquishing that right;<sup>3</sup> but the power to regulate does not include the power to destroy, and, under the pretense of regulating fares, a state can not require a railroad company to carry passengers without reward or for such a sum as to virtually amount to a confiscation or taking of property with-

1191, 23 Am. & Eng. R. Cas. 597; *Stone v. New Orleans, etc., R. Co.*, 116 U. S. 352, s. c. 6 Sup. Ct. R. 349, 391; *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, s. c. 6 Sup. Ct. R. 334, 388, 1191; *Ruggles v. People*, 91 Ill. 256; *Ruggles v. Illinois*, 108 U. S. 526; *Illinois Cent. R. Co. v. People*, 108 U. S. 541; *Illinois Cent. R. Co. v. People*, 95 Ill. 313; *McDuffee v. Portland, etc., R. Co.*, 52 N. H. 430; *Johnson v. Pensacola, etc., R. Co.*, 16 Fla. 623, s. c. 26 Am. R. 731.

<sup>1</sup> Wood on Railroads, (Minor's ed.) 1658.

<sup>2</sup> *Spofford v. Boston, etc., R. Co.*, 128 Mass. 326. See, also, *Johnson v. Pensacola, etc., R. Co.*, 16 Fla. 623, s. c. 26 Am. R. 731. But see *Atwater v. Dela-*

*ware, etc., R. Co.*, 48 N. J. L. 55; *Larrison v. Chicago, R. Co.*, 1 Interstate Com. R. 369, s. c. 1 Interstate Com. Com. R. 147.

<sup>3</sup> *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418, s. c. 10 Sup. Ct. R. 462, 702; *Budd v. New York*, 143 U. S. 517, s. c. 12 Sup. Ct. R. 468; *Munn v. Illinois*, 94 U. S. 113; *Stone v. Farmers' Loan & T. Co.*, 116 U. S. 307, s. c. 6 Sup. Ct. R. 348, 388, 1191; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155; *Wellman v. Chicago, etc., R. Co.*, 83 Mich. 592; *St. Louis, etc., R. Co. v. Gill*, 54 Ark. 101, s. c. 15 S. W. R. 18. As held in several of these cases, this may be done by the medium of a commission.

out compensation or due process of law.<sup>1</sup> As to interstate transportation, the subject is now governed very largely by the interstate commerce law.<sup>2</sup>

§ 1594. **Ticket as evidence of passenger's rights—Loss of ticket.**—As a general rule, a ticket (or a pass) is the only evidence, as between the conductor and the passenger, of the latter's right to transportation. He must produce it when demanded, and if he has no ticket or fails to exhibit it in accordance with the rules of the company, and refuses to pay the proper fare, he may be expelled.<sup>3</sup> The fact that he may have had a ticket, but lost it, makes no difference.<sup>4</sup> There is some

<sup>1</sup> *Stone v. Farmers' Loan & T. Co.*, 116 U. S. 307, s. c. 6 Sup. Ct. R. 348, 388, 1191, 23 Am. & Eng. R. Cas. 577; *Georgia R., etc., Co. v. Smith*, 128 U. S. 174, s. c. 9 Sup. Ct. R. 47, 35 Am. & Eng. R. Cas. 511; *Attorney-General v. Boston, etc., R. Co.*, 160 Mass. 62, s. c. 35 N. E. R. 252, 9 Lewis' Am. R. & Corp. R. 569; *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418, s. c. 10 Sup. Ct. R. 462, 2 Lewis' Am. R. & Corp. R. 564, and note. See, also, *Chicago, etc., R. Co. v. Dey*, 35 Fed. R. 866; *Pensacola, etc., R. Co. v. State*, 25 Fla. 310, s. c. 5 So. R. 833; *State v. Fremont, etc., R. Co.*, 23 Neb. 117, s. c. 36 N. W. R. 305.

<sup>2</sup> See *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557, s. c. 26 Am. & Eng. R. Cas. 1; *Larrison v. Chicago, etc., R. Co.*, 1 Interstate Com. Com. R. 147; *Smith v. Railroad Co.*, 1 Interstate Com. Com. R. 208; *Savery v. New York, etc., R. Co.*, 2 Interstate Com. Com. R. 338.

<sup>3</sup> *Peabody v. Oregon, etc., Co.*, 21 Ore. 121, s. c. 12 L. R. A. 823, and note; *Frederick v. Marquette, etc., R. Co.*, 37 Mich. 342, s. c. 26 Am. R. 531; *Mahoney v. Detroit City R. Co.*, 93 Mich. 612, s. c. 53 N. W. R. 793, 36 Cent. L. J. 90; *VanDuzan v. Grand Trunk, R. Co.*, 97 Mich. 439, s. c. 56 N. W. R.

848; *Hibbard v. New York, etc., R. Co.*, 15 N. Y. 455; *Townsend v. New York, etc., R. Co.*, 56 N. Y. 295; *Hall v. Memphis, etc., R. Co.*, 15 Fed. R. 57 s. c. 9 Am. & Eng. R. Cas. 348; *New York, etc., R. Co. v. Bennett*, 50 Fed. R. 496; *Reese v. Pennsylvania R. Co.*, 131 Pa. St. 422; *McKay v. Ohio River R. Co.*, 34 W. Va. 65, s. c. 44 Am. & Eng. R. Cas. 395, 11 S. E. R. 737; *Yorton v. Milwaukee, etc., R. Co.*, 54 Wis. 234, s. c. 6 Am. & Eng. R. Cas. 322, 41 Am. R. 23, 11 N. W. R. 482; *Bradshaw v. South Boston R. Co.*, 135 Mass. 407, s. c. 16 Am. & Eng. R. Cas. 386, 46 Am. R. 481; *Shelton v. Lake Shore, etc., R. Co.*, 29 Ohio St. 214; *Atchison, etc., R. Co. v. Gants*, 38 Kan. 608; *Chicago, etc., R. Co. v. Griffin*, 68 Ill. 499; *Pennsylvania R. Co. v. Connell*, 112 Ill. 295, s. c. 18 Am. & Eng. R. Cas. 339; *Prince v. International, etc., R. Co.*, 64 Tex. 144; *Louisville, etc., R. Co. v. Fleming*, 14 Lea (Tenn.) 128; *Western Maryland R. Co. v. Stocksedale*, (Md.) 34 Atl. R. 880; *Louisville, etc., R. Co. v. Breckenridge*, (Ky.) 34 S. W. R. 702; *Baggett v. Baltimore, etc., R. Co.*, 3 App. Cas. (D. C.) 522, 22 Wash. Law R. 441.

<sup>4</sup> *Downs v. New York, etc., R. Co.*, 36 Conn. 287, s. c. 4 Am. R. 77; *Chi-*

conflict among the authorities upon this subject,<sup>1</sup> but we think that the general rule which is supported both by the weight of authority and the better reason is as we have stated it, and that it applies, ordinarily, wherever the traveler has no ticket at all or the ticket is not apparently valid on its face. The rule, and the reasons for it are thus stated in a recent case: "The law settled by the great weight of authority" \* \* \* is that the face of the ticket is conclusive evidence to the conductor of the terms of the contract of carriage between the pas-

cago, etc., *R. Co. v. Willard*, 31 Ill. App. 435; *Frederick v. Marquette*, etc., *R. Co.*, 37 Mich. 342, s. c. 26 Am. R. 531; *Petrie v. Pennsylvania*, etc., *R. Co.*, 42 N. J. L. 449; *Ripley v. New Jersey R. Co.*, 31 N. J. L. 388; *Cresson v. Philadelphia*, etc., *R. Co.*, 11 Phila. (Pa.) 597; *Jerome v. Smith*, 48 Vt. 230, s. c. 21 Am. R. 125; *Crawford v. Cincinnati*, etc., *R. Co.*, 26 Ohio St. 580; *Duke v. Great Western R. Co.*, 14 U. C. Q. B. 377; *Cooper v. London*, etc., *R. Co.*, L.R. 4 Exch. Div. 88; *Rogers v. Atlantic City R. Co.*, (N. J.) 34 Atl. R. 11. He should, however, be given a reasonable time to search for it. *Louisville*, etc., *R. Co. v. Fleming*, 14 Lea (Tenn.) 128, s. c. 18 Am. & Eng. R. Cas. 347; *South Carolina R. Co. v. Nix*, 68 Ga. 572; *Maples v. New York*, etc., *R. Co.*, 38 Conn. 557, 9 Am. R. 434; *Clark v. Wilmington*, etc., *R. Co.*, 91 N. Car. 506, s. c. 18 Am. & Eng. R. Cas. 366; *International*, etc., *R. Co. v. Wilkes*, 68 Tex. 617, s. c. 34 Am. & Eng. R. Cas. 331; *Robson v. New York Cent. R. Co.*, 21 Hun (N. Y.) 387. See, also, *Pullman Palace Car Co. v. Reed*, 75 Ill. 125, s. c. 20 Am. R. 232.

<sup>1</sup> In the following cases the rule or its application was denied, under the particular circumstances, and the company was held liable. *Pennsylvania Co. v. Bray*, 125 Ind. 229, s. c. 25 N. E. R. 439; *Lake Erie*, etc., *R. Co. v. Fix*,

88 Ind. 381, s. c. 45 Am. R. 464, and cases cited; *Chicago*, etc., *R. Co. v. Graham*, 3 Ind. App. 28; *Evansville*, etc., *R. Co. v. Cates*, (Ind. App.) 41 N. E. R. 712, and numerous cases cited; *Hufford v. Grand Rapids R. Co.*, 64 Mich. 631, s. c. 31 N. W. R. 544; *Philadelphia*, etc., *R. Co. v. Rice*, 64 Md. 63; *English v. Delaware*, etc., *Co.*, 66 N. Y. 454; *New York*, etc., *R. Co. v. Winter's Admr.*, 143 U. S. 60, s. c. 12 Sup. Ct. R. 356; *Head v. Georgia*, etc., *R. Co.*, 79 Ga. 358, s. c. 7 S. E. R. 217; *Murdock v. Boston*, etc., *R. Co.*, 137 Mass. 293, s. c. 21 Am. & Eng. R. Cas. 268; *Missouri*, etc., *R. Co. v. Martino*, 2 Tex. Civ. App. 634, s. c. 18 S. W. R. 1066; *Texas*, etc., *R. Co. v. Dennis*, 4 Tex. Civ. App. 90, 23 S. W. R. 400; *Appleby v. St. Paul*, etc., *R. Co.*, 54 Minn. 169, 55 N. W. R. 1117; *Finch v. Northern Pac. R. Co.*, 47 Minn. 36, s. c. 49 N. W. R. 329; *Yorton v. Milwaukee*, etc., *R. Co.*, 62 Wis. 367, s. c. 21 N. W. R. 516; *Ellsworth v. Chicago*, etc., *R. Co.*, (Iowa) 63 N. W. R. 584; *Kansas City*, etc., *R. Co. v. Riley*, 68 Miss. 765, s. c. 9 So. R. 443, 4 Lewis' Am. R. & Corp. R. 654. Most of these cases, however, can be distinguished, upon the ground that the ticket was apparently valid on its face, or had been wrongfully cancelled by the conductor, who afterwards demanded fare, or the like.

senger and the company. The reason for this is found in the impossibility of operating railways on any other principle, with a due regard to the convenience and safety of the rest of the traveling public, or the proper security of the company in collecting fares. The conductor can not decide from the statement of the passenger what his verbal contract with the ticket agent was, in the absence of the counter evidence of the agent. To do so would take more time than a conductor can spare in the proper and safe discharge of his manifold and important duties, and it would render the company constantly subject to fraud, and consequent loss. The passenger must submit to the inconvenience of either paying his fare or ejection, and rely upon his remedy in damages against the company for the negligent mistake of the ticket agent.'"<sup>1</sup> It does not necessarily follow, however, that the railroad company may not be liable where the passenger has, in fact, a right to his passage at the ticket rate, and he is afforded no opportunity to get a ticket or is misled or given a wrong or defective ticket by the company's agent, or the like. Some of the courts have held, erroneously as it seems to us, that if he offers to explain the facts to the conductor and the latter ejects him in accordance with the rules of the company, the conductor may be justified as between himself and the company, but not as between himself, as a representative of the company, and the traveler, and that the traveler may recover as for a wrongful expulsion.<sup>2</sup> These cases, however, have been severely criticised,<sup>3</sup> and it seems to us, that while the traveler may have a right of action against the company in such a case, there is no wrongful expulsion, if it is accomplished in a proper manner, and that he can not recover upon that theory. Several of the courts, indeed, hold that he must pay his fare and seek his

<sup>1</sup> Per Taft, J. in *Poulin v. Canadian Pac. R. Co.*, 52 Fed. R. 197. The rule and the reasons for it are also well stated in the leading case of *Frederick v. Marquette, etc., R. Co.*, 37 Mich. 342, s. c. 26 Am. R. 531.

11 Ind. App. 547, s. c. 39 N. E. R. 429; *Evansville, etc., R. Co. v. Cates*, (Ind. App.) 41 N. E. R. 712; *Georgia, etc., R. Co. v. Dougherty*, 86 Ga. 744.

<sup>3</sup> 9 Harv. Law Rev., 353, 42 Cent. Law Jour., 117.

<sup>2</sup> *Cleveland, etc., R. Co. v. Beckett*,

remedy in an action for breach of the contract.<sup>1</sup> It may be that some of the cases to which we have just referred are contrary to the weight of authority<sup>2</sup> in holding that the only remedy is an action for breach of the contract, and in stating the measure of damages, but whether the action be in contract or in tort, for the breach of a contract or for the violation of a duty imposed by law, the gist of the action can not well be the expulsion of the traveler, where there is no unnecessary force, in accordance with the rules of the company, when he has no ticket or evidence of his right to transportation valid on its face or such as those rules reasonably require, and refuses to pay his fare. The wrong lies back of that, and it is well settled that a complaint proceeding upon one theory will not authorize a recovery upon another and entirely distinct and independent theory.<sup>3</sup>

<sup>1</sup> *McKay v. Ohio River R. Co.*, 34 W. Va. 65, s. c. 44 Am. & Eng. R. Cas. 395; *Western Maryland R. Co. v. Stocksedale*, (Md.) 34 Atl. R. 880; *Shelton v. Lake Shore, etc., R. Co.*, 29 Ohio St. 214; *Yorton v. Milwaukee, etc., R. Co.*, 54 Wis. 234, s. c. 6 Am. & Eng. R. Cas. 322, 41 Am. R. 33; *Hall v. Memphis, etc., R. Co.*, 15 Fed. R. 57; *Goins v. Western R. Co.*, 68 Ga. 190; *Frederick v. Marquette, etc., R. Co.*, 37 Mich. 342, s. c. 26 Am. R. 531. See, also, *Pennsylvania R. Co. v. Connell*, 112 Ill. 295, s. c. 54 Am. R. 238; *Wheeler's Modern Law of Carriers*, 168.

<sup>2</sup> See *ante*, p. 2482, note 1, p. 2488, note 1. See, also, *Northern Pac. R. Co. v. Pauson*, 70 Fed. R. 585, s. c. 30 L. R. A. 730; *Zion v. Southern Pac. R. Co.*, 67 Fed. R. 500; *Pennsylvania Co. v. Bray*, 125 Ind. 229; *Gorman v. Southern Pac. Co.*, 97 Cal. 1; *McGinnis v. Missouri Pac. R. Co.*, 21 Mo. App. 399; *Central etc., R. Co. v. Roberts*, 91 Ga. 513, 519; *Everett v. Chicago, etc., R. Co.*, 69 Iowa 15, s. c. 58 Am. R. 207; *Poole v. Northern Pac. R. Co.*, 16

Ore. 261; note to *Poulin v. Canadian Pac. R. Co.*, 32 Am. L. Reg. 153; *Cherry v. Kansas City, etc., R. Co.*, 52 Mo. App. 499; *Louisville, etc., R. Co. v. Gaines*, (Ky.) 36 S. W. R. 174.

<sup>3</sup> The rule which we think is supported by the better reason, although as we have shown, there is sharp conflict among the authorities, is thus stated by Mr. Freeman: "If by a mistake of one of the officers of the company he is not furnished with a proper ticket or check evidencing his right to be carried to his destination, his right nevertheless remains and if for want of the requisite evidence of that right, another servant of the company refuses to carry him without another payment of fare, the contract is broken, and he has a complete right of action for all damages resulting from such breach. But as the rule requiring him to show a proper ticket or to pay his fare, if demanded, is a reasonable one, he will not be justified in refusing compliance with it, and in remaining in the car until forcibly expelled, merely for the purpose of



§ 1595. **Stop-over privileges.**—As we shall see, a through ticket over several lines does not require the passenger to make a continuous trip over all such lines without stopping, but it does usually require him, after he has commenced his journey on any one of them to complete it as far as he is going upon that particular line. So, an ordinary ticket over one line is for one continuous trip, and if the passenger voluntarily leaves the train, upon which he has commenced it, at an intermediate point he can not resume it by virtue of such ticket, contrary to the rules of the company, on another train or at another time.<sup>1</sup> This rule does not, of course, fully apply where the journey is interrupted, without his fault, by an accident or the like.<sup>2</sup> Where his ticket gave the passenger no right to stop-over, it was held that the fact that the company's conductor had previously allowed others to stop-over on similar

heaping up damages. He should either pay the fare demanded or quit the train; and in either case we think he ought to recover, as a part of his damages, reasonable compensation for the indignity put upon him by the company through the default of its servant. But he can add nothing to his claim by remaining in the car until forcibly ejected, for the rule under which he is ejected being reasonable, is a complete protection to the company and its servants against the recovery of any damages, directly or indirectly for an assault made necessary by his own obstinacy, if no more violence than is required for his ejection is used. Such a case stands upon an entirely different ground from that of a passenger who has a proper ticket and is nevertheless expelled." Note to *Commonwealth v. Power*, 7 Met. (Mass.) 596, 41 Am. Dec. 465, 475.

<sup>1</sup> *Stone v. Chicago, etc., R. Co.*, 47 Iowa 82, s. c. 29 Am. R. 458; *Roberts v. Koehler*, 30 Fed. R. 94; *Pennsylvania R. Co. v. Parry*, 55 N. J. L. 551, s. c. 27 Atl. R. 914; *Drew v. Central*

*Pac. R. Co.*, 51 Cal. 425; *Petrie v. Pennsylvania R. Co.*, 42 N. J. L. 449; *Gulf, etc., R. Co. v. Henry*, 84 Tex. 678, s. c. 52 Am. & Eng. R. Cas. 230; *Churchill v. Chicago, etc., R. Co.*, 67 Ill. 390; *State v. Overton*, 24 N. J. L. 435; *Sears v. Eastern R. Co.*, 14 Allen (Mass.) 433; *McClure v. Philadelphia, etc., R. Co.*, 34 Md. 532, s. c. 6 Am. R. 345; *Cleveland, etc., R. Co. v. Bartram*, 11 Ohio St. 457; *Cheney v. Boston, etc., R. Co.*, 11 Metc. (Mass.) 121, s. c. 45 Am. Dec. 190, and note; *Hamilton v. New York Cent. R. Co.*, 51 N. Y. 100; *Wyman v. Northern Pac. R. Co.*, 34 Minn. 210, s. c. 22 Am. & Eng. R. Cas. 402; *Briggs v. Grand Trunk R. Co.*, 24 U. C. Q. B. 510. See, also, *Walker v. Wabash, etc., R. Co.*, 15 Mo. App. 333, s. c. 16 Am. & Eng. R. Cas. 380.

<sup>2</sup> *Dietrich v. Pennsylvania R. Co.*, 71 Pa. St. 432, s. c. 10 Am. R. 711; *Wilsey v. Louisville, etc., R. Co.*, 83 Ky. 511, s. c. 39 Am. & Eng. R. Cas. 418. See, also, *Briggs v. Grand Trunk R. Co.*, 24 U. C. Q. B. 510; *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25.

tickets, did not entitle him to do so, in violation of a rule of the company, although such rule had been adopted within a few months of the time he purchased his ticket and its existence was unknown to him.<sup>1</sup> The right of railroad companies to make reasonable regulations upon this subject is well settled.<sup>2</sup> Most companies give stop-over privileges upon compliance with certain conditions, but if there is a regulation permitting passengers to stop over on certain conditions, it seems that a passenger must, at his peril, ascertain what those conditions are, and comply with them, if he wishes to stop over without forfeiting his right to proceed on the same ticket.<sup>3</sup> There are, however, cases in which the company has been held liable where an authorized agent had agreed to give the passenger stop-over privileges or had misled him and he was expelled or prevented from stopping over and continuing his journey without paying additional fare.<sup>4</sup> So, of course, the contract, as evidenced by the ticket itself, may give him stop-over privileges, but a ticket containing a provision or notice that it is "good for one seat from Philadelphia to Pittsburg,"<sup>5</sup> or good until a certain number of days after date, or the like,

<sup>1</sup> *Johnson v. Concord, etc., R. Co.*, 46 N. H. 213, s. c. 88 Am. Dec. 199. See, also, *Gulf, etc., R. Co. v. Moody*, (Tex. Civ. App.) 30 S. W. R. 574.

<sup>2</sup> See *ante*, § 200. In Maine, however, the statute prohibits railroad companies from denying stop-over privileges. *Carpenter v. Grand Trunk R. Co.*, 72 Me. 388, 39 Am. R. 340, 3 Am. & Eng. R. Cas. 432; *Dryden v. Grand Trunk R. Co.*, 60 Me. 512. See, also, *Robinson v. Southern Pac. Co.*, 105 Cal. 541, s. c. 28 L. R. A. 773.

<sup>3</sup> *Oil Creek, etc., R. Co. v. Clark*, 72 Pa. St. 231. See, also, *Petrie v. Pennsylvania R. Co.*, 42 N. J. L. 449; *McClure v. Philadelphia, etc., R. Co.*, 34 Md. 532, s. c. 6 Am. R. 345; *Yorton v. Milwaukee, etc., R. Co.*, 54 Wis.

234, s. c. 41 Am. R. 23; *Beebe v. Ayres*, 28 Barb. (N. Y.) 275; *Breen v. Texas, etc., R. Co.*, 50 Tex. 43; *Wentz v. Erie, etc., R. Co.*, 3 Hun (N. Y.) 241; *Denny v. New York Cent. R. Co.*, 5 Daly (N. Y.) 50; *Johnson v. Philadelphia, etc., R. Co.*, 63 Md. 106; *Kellett v. Chicago, etc., R. Co.*, 22 Mo. App. 356.

<sup>4</sup> *Burnham v. Grand Trunk R. Co.*, 63 Me. 298, s. c. 18 Am. R. 220; *Tarbell v. Northern Cent. R. Co.*, 24 Hun (N. Y.) 51; *Palmer v. Railroad Co.*, 3 S. Car. 580, s. c. 16 Am. R. 750; *New York, etc., R. Co. v. Winter's Admr.*, 143 U. S. 60, s. c. 12 Sup. Ct. R. 356.

<sup>5</sup> *Dietrich v. Pennsylvania R. Co.*, 71 Pa. St. 432, s. c. 10 Am. R. 711.

is good only for one continuous passage, and does not give a right to stop over and make the journey piecemeal.<sup>1</sup>

§ 1596. **Through tickets—Coupons.**—There is some conflict among the authorities upon the subject of through tickets over several different roads, but the rule which is supported both by the better reason and by the weight of authority is that even when the ticket does not expressly provide that the first company is acting for the other companies merely as their agent in selling it, the rights of the passenger and the duties and responsibilities of the different companies are substantially the same as if the ticket had been purchased at the office of each company separately, unless there is something in the contract making the first company responsible beyond its own line.<sup>2</sup> A consequence of this rule is that the purchaser, after completing his journey on one line, need not take the first connecting train on the next line, but may stop over and use the ticket upon any one of the connecting lines at any time within the life of the ticket.<sup>3</sup> In other words, the contract is, in

<sup>1</sup>Terry v. Flushing, etc., R. Co., 13 Hun (N. Y.) 359; Dumphy v. Erie R. Co., 10 Jones & S. (N. Y.) 128; Craig v. Great Western R. Co., 24 U. C. Q. B. 504.

<sup>2</sup>Hartan v. Eastern R. Co., 114 Mass. 44; Pennsylvania R. Co. v. Connell, 112 Ill. 295, s. c. 18 Am. & Eng. R. Cas. 339, 54 Am. R. 238; Pennsylvania R. Co. v. Schwarzenberger, 45 Pa. St. 208; Young v. Pennsylvania R. Co., 115 Pa. St. 112, s. c. 28 Am. & Eng. R. Cas. 114; Nashville, etc., R. Co. v. Sprayberry, 9 Heisk. (Tenn.) 852; Hood v. New York, etc., R. Co., 22 Conn. 1, 502; Lundy v. Central Pac. R. Co., 66 Cal. 191, s. c. 56 Am. R. 100; Mosher v. St. Louis, etc., R. Co., 127 U. S. 390, s. c. 8 Sup. Ct. R. 1324; Gulf, etc., R. Co. v. Looney, 85 Tex. 158, s. c. 19 S. W. R. 1039; Sprague v. Smith, 29 Vt. 421, s. c. 70 Am. Dec. 424. But see Williams v. Vanderbilt,

28 N. Y. 217, s. c. 84 Am. Dec. 333, and note; Candee v. Pennsylvania R. Co., 21 Wis. 582, s. c. 94 Am. Dec. 566; Illinois Cent. R. Co. v. Copeland, 24 Ill. 332, s. c. 76 Am. Dec. 749; Najac v. Boston, etc., R. Co., 7 Allen (Mass.) 329; Watkins v. Pennsylvania R. Co., 21 D. C. 1; Wolff v. Central R., etc., Co., 68 Ga. 653, s. c. 6 Am. & Eng. R. Cas. 441; Mytton v. Midland R. Co., 4 H. & N. 615; Great Western R. Co. v. Blake, 7 H. & N. 987; Kent v. Midland R. Co., L. R. 10 Q. B. 1. It may be responsible where the contract is joint or a partnership exists. See *ante*, §§ 1444, 1445; Croft v. Baltimore, etc., R. Co., 1 McArthur (U. S. C. C.) 492; Champion v. Bostwick, 18 Wend. (N. Y.) 175, s. c. 31 Am. Dec. 376, and note.

<sup>3</sup>Auerbach v. New York Cent. R. Co., 89 N. Y. 281, s. c. 42 Am. R. 290, 6 Am. & Eng. R. Cas. 334; Brooke v.

effect, an entire and separate contract with each company over whose road it is issued, and the traveler is not obliged to make a continuous journey, without stop, over all the different roads, but he is obliged to make a continuous trip, in the absence of any stop-over privileges, over any one of the particular roads after he has once begun his journey over that road. Another consequence of the rule is that the traveler, where his through ticket is limited as to time, must begin his journey over the last connecting line within the time limited in the ticket or coupon over that line, and if he does not do so it will not be good over such line even though he may have begun his journey at the original place of departure on a connecting line in time to have completed it over all the lines but was prevented from so doing by delay on one of such prior connecting lines.<sup>1</sup> In several cases it has been suggested, but not decided, that the first company can only be presumed to act as agent of the connecting lines, so as not to become liable for their defaults, where the ticket issued is a coupon ticket and each coupon purports to be the ticket of the connecting line over which it is used;<sup>2</sup> but, while most of the authorities we have cited in support of the general rule were cases in which coupon tickets were issued, we see no good reason why the rule should not apply where through tickets are issued in other forms so long as there is nothing to indicate that the first company intended to guaranty through transportation or to assume liability for the acts of others and did not act merely as their agent.<sup>3</sup> It is

Grand Trunk R. Co., 15 Mich. 332; Knight v. Portland, etc., R. Co., 56 Me. 234, s. c. 96 Am. Dec. 449; Milnor v. New York, etc., R. Co., 4 Daly (N. Y.) 355; Little Rock, etc., R. Co. v. Dean, 43 Ark. 529, s. c. 51 Am. R. 584, 586; Nichols v. Southern Pac. Co., 23 Ore. 123, s. c. 31 Pac. R. 296, 18 L. R. A. 55, 58.

<sup>1</sup> Pennsylvania Co. v. Hine, 41 Ohio St. 276; Gulf, etc., R. Co. v. Looney, 85 Tex. 158, s. c. 19 S. W. R. 1039, 52 Am. & Eng. R. Cas. 197. If the last day is Sunday and the last company

runs no train on that day, he may, it seems, take passage on the first train the next day. Little Rock, etc., R. Co. v. Dean, 43 Ark. 529, s. c. 51 Am. R. 584, 21 Am. & Eng. R. Cas. 279.

<sup>2</sup>See Louisville, etc., R. Co. v. Weaver, 9 Lea (Tenn.) 38, s. c. 42 Am. R. 654; Gulf, etc., R. Co. v. Looney, 85 Tex. 158, s. c. 19 S. W. R. 1039, 52 Am. & Eng. R. Cas. 197.

<sup>3</sup>See Hood v. New York, etc., R. Co., 22 Conn. 1, 502; 3 Wood on Railroads, 1662, note 1.

usually provided that coupons shall not be good if detached, but, as the contract is regarded as the distinct and separate contract of each road over whose line a coupon calls for transportation, it has been held that a ticket with part of the coupons attached is assignable or transferable, in the absence of any provision prohibiting its transfer, and good over the roads for which the attached coupons are issued, even in the hands of one who has bought it at a reduced rate.<sup>1</sup> Their assignability may, however, be restricted by provisions in the contract.<sup>2</sup> The sale of a ticket to a station on a connecting line creates no implied contract that any particular train will stop at that station or that it will be reached without change of cars or waiting at other stations for other trains.<sup>3</sup>

§ 1597. **Round trip tickets.**—A round trip excursion ticket is good until used, in the absence of any limitation or notice to the contrary at the time of its purchase.<sup>4</sup> Where it is used by the purchaser in going to the station named therein and is then sold and transferred by him, it is valid in the hands of the holder, in the absence of any restrictions as to transferring it, and entitles him to a return passage, subject to its limitations as to time and the like.<sup>5</sup> Where such a ticket contained a statement that it was “not good for passage if detached,” the first four words being upon the “going part” and the words “if detached” being upon the “returning part,” it was held that it was good for passage where both parts were presented to the conductor on the “going” trip in good faith, although they had become detached by accident.<sup>6</sup> So, where the return

<sup>1</sup> *Nichols v. Southern Pac. Co.*, 23 Ore. 123, s. c. 31 Pac. R. 296, 18 L. R. A. 55.

<sup>2</sup> *Drummond v. Southern Pac. R. Co.*, 7 Utah 118, 25 Pac. R. 733; *Cody v. Central Pac. R. Co.*, 4 Saw. (U. S. C. C.) 114; *Granier v. Louisiana, etc., R. Co.*, 42 La. Ann. 880.

<sup>3</sup> *Atchison, etc., R. Co. v. Cameron*, 66 Fed. R. 709. See, also, *Duling v. Philadelphia, etc., R. Co.*, 66 Md. 120, s. c. 6 Atl. R. 592.

<sup>4</sup> *Pennsylvania R. Co. v. Spicker*, 105 Pa. St. 142, s. c. 23 Am. & Eng. R. Cas. 672.

<sup>5</sup> *Carsten v. Northern Pac. R. Co.*, 44 Minn. 454, s. c. 47 N. W. R. 49; *Hoffman v. Northern Pac. R. Co.*, 45 Minn. 53, s. c. 47 N. W. R. 312.

<sup>6</sup> *Wightman v. Chicago, etc., R. Co.*, 73 Wis. 169, s. c. 9 Am. St. R. 778. But it would be otherwise if the holder had violated the contract by purposely detaching them himself, and a

coupon of a round trip ticket was taken up by mistake on the going trip, and the going coupon was presented for return passage with an explanation of the facts, it was held that it was the duty of the conductor to accept it and that the passenger could not be rightfully ejected.<sup>1</sup> But where one of the conditions of a round trip ticket required it to be stamped and signed at the destination before it would be good for the return trip, it was held that the holder who had neglected to have this done was not entitled to return passage thereon, and might be ejected, for refusing to pay fare, although he offered to prove his identity.<sup>2</sup>

§ 1598. *Limited tickets.*—The right of a railroad company to limit the time within which a ticket over its road shall be good is well settled.<sup>3</sup> But the limitation must be reasonable.<sup>4</sup> Subject to this qualification a ticket may be limited

conductor is not bound to accept a detached coupon in such a case, at least without seeing the entire ticket. *Norfolk, etc., R. Co. v. Wysor*, 82 Va. 250, s. c. 26 Am. & Eng. R. Cas. 234; *Boston, etc., R. Co. v. Chipman*, 146 Mass. 107, s. c. 4 Am. St. R. 293, 34 Am. & Eng. R. Cas. 336; *Louisville, etc., R. Co. v. Harris*, 9 Lea (Tenn.) 180, s. c. 42 Am. R. 668, 16 Am. & Eng. R. Cas. 374; *De Lucas v. New Orleans, etc., R. Co.*, 38 La. Ann. 930.

<sup>1</sup>*Pennsylvania Co. v. Bray*, 125 Ind. 229, s. c. 25 N. E. R. 439. But see *ante*, §§ 1593, 1594.

<sup>2</sup>*Edwards v. Lake Shore, etc., R. Co.*, 81 Mich. 364, s. c. 3 Lewis' Am. R. & Corp. R. 166; *Mosher v. St. Louis, etc., R. Co.*, 127 U. S. 390, s. c. 8 Sup. Ct. R. 1324; *Boylan v. Hot Springs R. Co.*, 132 U. S. 146, s. c. 10 Sup. Ct. R. 50; *Western Maryland R. Co. v. Stocksedale*, (Md.) 34 Atl. R. 880. But see *Gulf, etc., R. Co. v. St. John*, (Tex. Civ. App.) 35 S. W. R. 501.

<sup>3</sup>*Rowitzky v. Louisville, etc., R. Co.*, 40 La. Ann. 47, s. c. 3 So. R. 387;

*Churchill v. Chicago, etc., R. Co.*, 67 Ill. 390; *Hill v. Syracuse, etc., R. Co.*, 63 N. Y. 101; *Pennsylvania Co. v. Hine*, 41 Ohio St. 276; *Farewell v. Grand Trunk R. Co.*, 15 U. C. C. P. 427; *Craig v. Great Western R. Co.*, 24 U. C. Q. B. 504; *Boston, etc., R. Co. v. Proctor*, 1 Allen (Mass.) 267; *Hutchinson on Carriers*, (2d ed.) §§ 575, 576; *Schouler, Bailm.*, 610; 3 *Wood on Railroads*, 1636, *et seq.*

<sup>4</sup>Thus, if the company runs no train on the day to which it is limited, or if it is a round trip ticket and there is not time to make the round trip within the period of limitation, or if it is a through ticket over connecting lines and the time is too short to reach the last line, where there is no delay within such period, we suppose the traveler could take the first train on the next day. See *Texas, etc., R. Co. v. Dennis*, 4 Tex. Civ. App. 90, s. c. 23 S. W. R. 400; *Gulf, etc., R. Co. v. Wright*, 2 Tex. C. App. 463, s. c. 21 S. W. R. 399; *Briggs v. Grand Trunk R. Co.*, 24 U. C. Q. B. 510.

even to a single day or a particular train.<sup>1</sup> A limited ticket is not good for passage after the time to which it is limited has expired, and, as a general rule, one who presents such a ticket and refuses to pay his fare or produce a proper ticket may be expelled from the train.<sup>2</sup> Substantially the same rules apply in this respect to commutation or mileage tickets as to single tickets.<sup>3</sup> We have already considered the rule as to limited through tickets.<sup>4</sup> As the language of the ticket is that of the carrier and as forfeitures are "odious," in case of ambiguity and doubt, it will be construed most strongly against the carrier.<sup>5</sup> Under this rule it has been held that when a ticket is required to be used on or before a specified day it is sufficient if the trip is begun upon the particular line and the ticket presented before midnight of such day, although the journey is not completed upon such line until after that time.<sup>6</sup> So, in one case, where the ticket provided that it should not be "good for

<sup>1</sup> *McClure v. Philadelphia, etc., R. Co.*, 34 Md. 532, s. c. 6 Am. R. 345; *State v. Campbell*, 32 N. J. L. 309; *Howard v. Chicago, etc., R. Co.*, 61 Miss. 194, s. c. 18 Am. & Eng. R. Cas. 313; *Elmore v. Sands*, 54 N. Y. 512; *Gale v. Delaware, etc., R. Co.*, 7 Hun (N. Y.) 670; *Shedd v. Troy, etc., R. Co.*, 40 Vt. 88; *Briggs v. Grand Trunk R. Co.*, 24 U. C. Q. B. 510; *Muckle v. Rochester, etc., R. Co.*, 79 Hun 32, s. c. 29 N. Y. Supp. 732; *Missouri, etc., R. Co. v. Murphy*, (Tex. Civ. App.) 35 S. W. R. R. 66.

<sup>2</sup> *State v. Campbell*, 32 N. J. L. 309; *Rawitzky v. Louisville, etc., R. Co.*, 40 La. Ann. 47, s. c. 3 So. R. 387; *Grogan v. Chesapeake, etc., R. Co.*, 39 W. Va. 415, s. c. 19 S. E. R. 563; *Lewis v. Western, etc., R. Co.*, 93 Ga. 225, s. c. 18 S. E. R. 650; *Churchill v. Chicago, etc., R. Co.*, 67 Ill. 390; *Pennington v. Philadelphia, etc., R. Co.*, 62 Md. 95, s. c. 18 Am. & Eng. R. Cas. 310, and note; also, authorities cited in the first note to this section.

<sup>3</sup> *Lillis v. St. Louis, etc., R. Co.*, 64 Mo. 464, s. c. 27 Am. R. 255; *Sherman v. Chicago, etc., R. Co.*, 40 Iowa 45; *Powell v. Pittsburg, etc., R. Co.*, 25 Ohio St. 70. See, also, as to return tickets, *Rawitzky v. Louisville, etc., R. Co.*, 40 La. Ann. 47, s. c. 31 Am. & Eng. R. Cas. 129; *Arnold v. Pennsylvania R. Co.*, 115 Pa. St. 135, s. c. 8 Atl. R. 213.

<sup>4</sup> *Ante*, § 1596.

<sup>5</sup> *Auerbach v. New York Cent. R. Co.*, 89 N. Y. 281, s. c. 42 Am. R. 290, 6 Am. & Eng. R. Cas. 334; *Evans v. St. Louis, etc., R. Co.*, 11 Mo. App. 463; *Lundy v. Central Pac. R. Co.*, 66 Cal. 191, s. c. 56 Am. R. 100; *Little Rock, etc., R. Co. v. Dean*, 43 Ark. 529, s. c. 51 Am. R. 584.

<sup>6</sup> *Evans v. St. Louis, etc., R. Co.*, 11 Mo. App. 463; *Auerbach v. New York Cent. R. Co.*, 89 N. Y. 281; *Georgia Southern R. Co. v. Bigelow*, 68 Ga. 219.

passage after nine days from date of sale," it was held sufficient that the journey was commenced, although not completed within that time,<sup>1</sup> but this decision seems to us to be of doubtful soundness.<sup>2</sup> It has also been held that a ticket marked "good this trip only," although dated, is good on any subsequent day until used, but this decision has also been criticised.<sup>3</sup> In some states it is provided by statute that tickets shall be good for a certain number of years from their date, notwithstanding any limitation therein, but such a statute has no extra territorial force and does not govern a ticket sold at a station in another state for transportation from such station to a place within the state which enacted the statute,<sup>4</sup> nor does it apply where a ticket is used in another state, although purchased in the state in which the statute exists for transportation from a place therein to a place in such other state.<sup>5</sup> It has been held, in accordance with what we believe to be the better rule, although the authorities are conflicting, that a traveler has no right to rely upon the verbal representations or statements of an agent having no authority in the premises that a ticket will be good contrary to the express limitations on its face.<sup>6</sup> This must certainly be the true rule where the ticket contains the real contract, or the representations were not made at the time the ticket was purchased, or the agent had no apparent authority to make them. The mere checking of baggage on such a ticket after the time has expired will not operate as a

<sup>1</sup> *Lundy v. Central Pac. R. Co.*, 66 Cal. 191, s. c. 56 Am. R. 100, 18 Am. & Eng. R. Cas. 309.

<sup>2</sup> See *Gulf, etc., R. Co. v. Wright*, 2 Tex. Civ. App. 463.

<sup>3</sup> *Pier v. Finch*, 24 Barb. 514, doubted by Judge Redfield in 1 Redf. on Railways, (6th ed.) 93, n. 5. See, also, *Texas, etc., Co. v. Powell*, (Tex. Civ. App.) 35 S. W. R. 841, which seems to us to go to the other extreme. A ticket "good for this day and train only" has been held good for any train during the day of its date. *Gale*

*v. Delaware, etc., R. Co.*, 7 Hun (N. Y.) 670.

<sup>4</sup> *Lafarier v. Grand Trunk R. Co.*, 84 Me. 286, s. c. 24 Atl. R. 848.

<sup>5</sup> *Boston, etc., R. Co. v. Trafton*, 151 Mass. 229; *Carpenter v. Grand Trunk R. Co.*, 72 Me. 388, s. c. 39 Am. R. 340.

<sup>6</sup> *Boise v. Hudson River R. Co.*, 61 Barb. (N. Y.) 611; *Pennington v. Philadelphia, etc., R. Co.*, 62 Md. 95; *McClure v. Philadelphia, etc., R. Co.*, 34 Md. 532, s. c. 6 Am. R. 345. But see *Nelson v. Long Island R. Co.*, 7 Hun (N. Y.) 140. See, also, *ante*, § 1593.



waiver of the limitation,<sup>1</sup> nor will the mere fact that others, or the traveler himself, may have been permitted to ride on other occasions on the same or a similar ticket after it had expired, prevent the company from enforcing the contract.<sup>2</sup> But the limitation may be waived and the time extended by an authorized officer of the company.<sup>3</sup>

§ 1599. **Non-transferable tickets.**—In the absence of anything to the contrary a ticket is transferable, being regarded as evidencing a contract to carry the bearer.<sup>4</sup> But a railroad company may issue non-transferable tickets, and limited tickets sold at a reduced rate are usually issued in that form. The ticket may expressly provide that it shall not be transferred, or it may provide that it shall be void if presented by any one other than the original holder, and it is held that the words “non-transferable,” or words of similar import, will restrict the right to use the ticket to the original purchaser.<sup>5</sup> If a ticket which is not transferable is procured and issued in the name of one person the conductor is justified in refusing to honor it when presented by another, although it was really purchased for the

<sup>1</sup> *Wentz v. Erie R. Co.*, 3 Hun (N. Y.) 241.

<sup>2</sup> *Hill v. Syracuse, etc., R. Co.*, 63 N. Y. 101; *Dietrich v. Pennsylvania Co.*, 71 Pa. St. 432, s. c. 10 Am. R. 711; *Johnson v. Concord, etc., R. Co.*, 46 N. H. 213, s. c. 88 Am. Dec. 199; *Wakefield v. South Boston R. Co.*, 117 Mass. 544; *Sherman v. Chicago, etc., R. Co.*, 40 Iowa 45; *Duling v. Philadelphia, etc., R. Co.*, 66 Md. 120, s. c. 6 Atl. R. 592. See, also, *Trotlinger v. East Tenn., etc., R. Co.*, 11 Lea (Tenn.) 533, s. c. 13 Am. & Eng. R. Cas. 49. But compare *Thompson v. Truesdale*, (Minn.) 63 N. W. R. 259, s. c. 2 Am. & Eng. R. Cas. (N. S.) 105.

<sup>3</sup> *Randall v. New Orleans, etc., R. Co.*, 45 La. Ann. 778, s. c. 13 So. R. 166.

<sup>4</sup> *Hudson v. Kansas Pac. R. Co.*, 3 McCrary (U. S. C. C.) 249, s. c. 9 Fed. R. 879; *Nichols v. Southern Pac. R. Co.*, 23 Ore. 123, s. c. 31 Pac. R. 296, 18 L. R. A. 55; *Hoffman v. Northern Pac. R. Co.*, 45 Minn. 53; *Carsten v. Northern Pac. R. Co.*, 44 Minn. 454, s. c. 9 L. R. A. 688.

<sup>5</sup> *Langdon v. Howells*, L. R. 4 Q. B. Div. 337; *Drummond v. Southern Pac. R. Co.*, 7 Utah 118, s. c. 25 Pac. R. 733; *Post v. Chicago, etc., R. Co.*, 14 Neb. 110, s. c. 45 Am. R. 100, 9 Am. & Eng. R. Cas. 345; *Granier v. Louisiana, etc., R. Co.*, 42 La. Ann. 880; *Way v. Chicago, etc., R. Co.*, 64 Iowa 48, s. c. 52 Am. R. 431; *Cody v. Central Pac. R. Co.*, 4 Sawy. (U. S. C. C.) 114; *Robostelli v. New York, etc., R. Co.*, 33 Fed. R. 796, s. c. 34 Am. & Eng. R. Cas. 515; *Walker v. Wabash*,

latter.<sup>1</sup> It has been held that, although a ticket is not transferable and is therefore invalid in the hands of the third person who presents it, the conductor has no right both to refuse to honor it and to take it up and retain it without permitting the holder to ride upon it,<sup>2</sup> unless the contract gives him that right.<sup>3</sup> But it has also been held that one who presents a non-transferable commutation ticket issued to another, without attempting to conceal his identity, is entitled to the same care and protection as other passengers where it has been accepted and his right to ride upon it has been recognized by the conductor.<sup>4</sup> In some of the states statutes have been enacted to prevent ticket brokerage or scalping,<sup>5</sup> but it was held where a traveler purchased a ticket, the assignability of which was not restricted, from a scalper in New York that he might maintain an action against the railroad company in Pennsylvania, for a refusal to carry him on the ticket, notwithstanding a statute of the latter state made it unlawful for any one other than an authorized agent of the company to sell such tickets.<sup>6</sup>

**§ 1600. Commutation and mileage tickets.**—In the absence of any statutory provision upon the subject, a railroad company is under no obligation to sell commutation or mileage tickets, but it has been held that when it has established com-

etc., R. Co., 15 Mo. App. 333, s. c. 16 Am. & Eng. R. Cas. 380; *Friedenrich v. Baltimore, etc.*, R. Co., 53 Md. 201.

<sup>1</sup> *Chicago, etc., R. Co. v. Bannerman*, 15 Ill. App. 100.

<sup>2</sup> *Post v. Chicago, etc., R. Co.*, 14 Neb. 110, s. c. 45 Am. R. 100.

<sup>3</sup> *Drummond v. Southern Pac. R. Co.*, 7 Utah 118, s. c. 25 Pac. R. 733. It has been held that a stipulation for a forfeiture if the ticket is found in the hands of another may justify the conductor in taking it up after it gets back into the hands of the original purchaser. *Friedenrich v. Baltimore, etc., R. Co.*, 53 Md. 201.

<sup>4</sup> *Robostelli v. New York, etc., R.*

Co., 33 Fed. R. 796, s. c. 34 Am. & Eng. R. Cas. 515.

<sup>5</sup> As to the validity and effect of such statutes, see *Burdick v. People*, 149 Ill. 600, 10 Lewis' Am. R. & Corp. R. 451, and note; *State v. Clarke*, 109 N. Car. 739, note, s. c. 14 S. E. R. 84; *State v. Ray*, 109 N. Car. 736, s. c. 14 S. E. R. 83; *State v. Fry*, 81 Ind. 7; *Fry v. State*, 63 Ind. 553; *State v. Corbett*, 57 Minn. 345, s. c. 59 N. W. R. 317; note in 24 L. R. A. 152.

<sup>6</sup> *Sleeper v. Pennsylvania R. Co.*, 100 Pa. St. 259, s. c. 9 Am. & Eng. R. Cas. 291, 45 Am. R. 380. The statute did not, however, make the purchase or use of a ticket obtained from an unauthorized person an offense.

mutation rates and keeps such tickets for sale to the public, the refusal to sell a ticket of that kind, or make such rates to a particular individual under the same circumstances and upon the same conditions as they are sold to the rest of the public is an unjust and illegal discrimination.<sup>1</sup> In Massachusetts a statute was enacted providing that "every railroad corporation operating within this commonwealth shall provide and have on sale, for twenty dollars, mileage tickets representing one thousand miles, which shall be accepted and received for fare and passage upon all railroad lines in this commonwealth, as well and under like condition as upon the line or lines of the corporation issuing such ticket." This was held unconstitutional upon the grounds that it authorized one railroad company to determine the conditions upon which another railroad company must carry passengers and that it compelled one company to carry passengers on the credit of another, thus taking property for the public use without compensation or the owner's consent.<sup>2</sup> As we have elsewhere shown, a mileage ticket, limited to a certain time does not entitle the holder to passage after the expiration of the time specified, although the whole number of miles for which it is good has not been traveled.<sup>3</sup> The conductor may, in accordance with the provisions of the ticket or the rules and regulations of the company, refuse to accept detached coupons, and may expel the traveler, who refuses to pay his fare, if he does not produce a proper ticket or mileage book and permit the conductor to properly detach the coupons.<sup>4</sup> A passenger has no right to require the conductor

<sup>1</sup> *State v. Delaware, etc., R. Co.*, 48 N. J. L. 55, s. c. 23 Am. & Eng. R. Cas. 543, s. c. 2 Atl. R. 803. See, also, *Indianapolis R. Co. v. Rinard*, 46 Ind. 293; *Larrison v. Chicago, etc., R. Co.*, 1 Interstate Com. Com. R. 147; *Associated, etc., Grocers v. Missouri Pac. R. Co.*, 1 Interstate Com. Com. R. 156.

<sup>2</sup> *Attorney-General v. Boston, etc., R. Co.*, 160 Mass. 62, s. c. 35 N. E. R. 252, 22 L. R. A. 112, 9 Lewis' Am. R. & Corp. R. 569, 56 Am. & Eng. R. Cas.

59. Two members of the court, however, dissented, and the decision has met with some criticism. See 7 Harv. Law Rev., 356.

<sup>3</sup> *Ante*, § 1598, p. 2497, note 3. As to redemption of the unused portion, see *Smith v. Philadelphia, etc., R. Co.*, 11 Pa. Co. Ct. R. 555; *Sidman v. Richmond, etc., R. Co.*, 3 Interstate Com. Com. R. 512.

<sup>4</sup> *Norfolk, etc., R. Co. v. Wysor*, 82 Va. 250, s. c. 26 Am. & Eng. R. Cas.

to take the coupons from the back part of a mileage book instead of the front part.<sup>1</sup> A regulation of the company that monthly commutation tickets shall be surrendered to the conductor on the last trip taken during the period for which it is issued is reasonable and the purchaser of such a ticket with the regulation indorsed upon it may be ejected, if he fails or refuses to surrender it on his last trip or pay the regular fare, even though he may have accidentally lost it.<sup>2</sup> It is not uncommon for railroad companies to require the holder of a non-transferable mileage book or commutation ticket to sign his name when requested by the conductor for identification, and we have no doubt that such a regulation is reasonable. But a family commutation ticket, which, on its face purports to be for the use of a man and his family, authorizes his son, who resides with him as a member of the family, to travel thereon, in the absence of anything to the contrary, although he is over twenty-one years of age.<sup>3</sup> Where a mileage ticket is issued by a road owning two lines or owning one and leasing another, purporting to be good for a certain number of miles on one and a certain number of miles on the other, the holder of the ticket, after having traveled on the one line for the specified number of miles for which it is good on that line, is not entitled to use upon the same line the unused mileage good over the other line.<sup>4</sup>

235; *Crawford v. Cincinnati, etc., R. Co.*, 26 Ohio St. 580; *Bennett v. Railroad Co.*, 7 Phila. (Pa.) 11; *Ripley v. New Jersey, etc., Co.*, 31 N. J. L. 388; *Rogers v. Atlantic City R. Co.*, (N. J.) 34 Atl. R. 11; *Downs v. New York, etc., R. Co.*, 36 Conn. 287, s. c. 4 Am. R. 77. See, also, *Marshall v. Boston, etc., R. Co.*, 145 Mass. 164.

<sup>1</sup> *Eaton v. McIntire*, (Me.) 34 Atl. R. 525. There are two reasons for this. It is customary to take them from the front rather than the back, and the right to determine from what part they shall be taken belongs, on principle, to the conductor, whose duty it is to detach them, rather than to the passenger.

<sup>2</sup> *Rogers v. Atlantic City R. Co.*, (N. J.) 34 Atl. R. 11.

<sup>3</sup> *Chicago, etc., R. Co. v. Chisholm*, 79 Ill. 584. But it was also said in this case that it would be otherwise if there was a regulation of the carrier, of which the purchaser was informed at the time of the purchase, that a son over twenty-one years old could not ride on the ticket. See, generally, as to such tickets, *Grimes v. Minneapolis, etc., R. Co.*, 37 Minn. 66; *Knopf v. Richmond, etc., R. Co.*, 85 Va. 769, s. c. 37 Am. & Eng. R. Cas. 140.

<sup>4</sup> *Terre Haute, etc., R. Co. v. Fitzgerald*, 47 Ind. 79. In this case the ticket was a "thousand mile ticket" good for seven hundred miles over

§ 1601. **Excursion tickets.**—It has been held that an excursion ticket constituting or containing a special contract is conclusive evidence of the terms of the contract, and that advertisements of the excursion are not admissible to vary its terms.<sup>1</sup> The rule that a railroad company may limit the use of a ticket to a certain day or train is peculiarly applicable in such cases, and, where the ticket contains such a stipulation it can not be used on any other day or train.<sup>2</sup> Nor can such a ticket, which is bought at a reduced rate and conditioned to be good only for a “continuous trip” to the destination specified, be used on a train which does not make, and is not scheduled to make, the through trip, but stops at an intermediate point.<sup>3</sup> But the time limited for a round trip must not be so short that a passenger who uses due diligence can not commence his return trip on some train within the time, or it will be unreasonable.<sup>4</sup> It has also been held that, while a railroad company may run an excursion train at reduced rates, and may enforce a rule requiring passengers to purchase tickets, as a condition upon which they may obtain the benefit of such rates, against all who, by their own fault, fail to comply with it, yet, if one is unable to procure a ticket through the fault of the company, he may take passage upon such train, and, upon a tender of the ticket rate of fare, will be entitled to all the rights and privileges that a ticket would afford him.<sup>5</sup>

one line and three hundred over the other.

<sup>1</sup> Howard v. Chicago, etc., R. Co., 61 Miss. 194, s. c. 18 Am. & Eng. R. Cas. 313.

<sup>2</sup> McRae v. Wilmington, etc., R. Co., 88 N. Car. 526, s. c. 18 Am. & Eng. R. Cas. 316; Pennington v. Philadelphia, etc., R. Co., 62 Md. 95, s. c. 18 Am. & Eng. R. Cas. 310; Howard v. Chicago, etc., R. Co., 61 Miss. 194; Nolan v. New York, etc., R. Co., 41 N. Y. Sup. Ct. 541; State v. Campbell, 32 N. J. L. 309; McElroy v. Railroad Co., 7 Phila. (Pa.) 206.

<sup>3</sup> Johnson v. Philadelphia, etc., R. Co., 63 Md. 106, s. c. 18 Am. & Eng. R. Cas. 304.

<sup>4</sup> Texas, etc., R. Co. v. Dennis, 4 Tex. Civ. App. 90, s. c. 23 S. W. R. 400.

<sup>5</sup> Chicago, etc., R. Co. v. Graham, 3 Ind. App. 28, s. c. 29 N. E. R. 170. In this case the company was held liable for his expulsion upon refusal to pay the full regular fare. See, also, Jeffersonville R. Co. v. Rogers, 28 Ind. 1; Cleveland, etc., R. Co. v. Beckett, 11 Ind. App. 547, s. c. 39 N. E. R. 429, and authorities there cited.

§ 1602. **Conductor's checks.**—It is customary for conductors to give checks, in many cases where tickets or coupons are taken up, as evidence of the payment of fare or the passenger's right to transportation or to stop over and resume his passage within a certain time.<sup>1</sup> But it has been held that a conductor's check authorizing the passenger to stop over for a specified time must be presented at or before the expiration of such time,<sup>2</sup> and that a check in the ordinary form is a mere receipt or certificate of the payment of fare for a continuous trip or the surrender of the regular ticket, and will not authorize the passenger to stop over unless it contains a clause to that effect.<sup>3</sup> It has also been held in New Hampshire that a passenger may refuse to surrender his ticket while other stations have to be passed before reaching his destination, unless he is given a check or other evidence of his right to passage,<sup>4</sup> but this has been denied in Illinois.<sup>5</sup> If a check has been given by one conductor to a passenger upon the surrender of his ticket, and this is the only evidence of his right to passage, and he fails to produce it upon the proper demand of another conductor and refuses to pay his fare, he may be ejected.<sup>6</sup> It has been held in some cases that, although the first conductor makes a mistake and gives the wrong check, or none at all, the passenger can not recover for an expulsion by another conductor, as the check takes the place of the ticket and is the only evidence, as between such conductor and the passenger, of the latter's right to passage.<sup>7</sup> But if the passenger is, in fact, entitled to such

<sup>1</sup> Such a custom or regulation is reasonable. *Northern R. Co. v. Page*, 22 Barb. (N. Y.) 130; *Loring v. Aborn*, 4 Cush. (Mass.) 608.

<sup>2</sup> *Churchill v. Chicago, etc., R. Co.*, 67 Ill. 390.

<sup>3</sup> *Wyman v. Northern Pac. R. Co.*, 34 Minn. 210, s. c. 22 Am. & Eng. R. Cas. 402, 404; *McClure v. Philadelphia, etc., R. Co.*, 34 Md. 532, s. c. 6 Am. R. 345; *State v. Overton*, 24 N. J. L. 435, s. c. 61 Am. Dec. 671, 673. See, also, *Stone v. Chicago, etc., R. Co.*, 47 Iowa 82, s. c. 29 Am. R. 458;

*Cheney v. Boston, etc., R. Co.*, 11 Met. (Mass.) 121, s. c. 45 Am. Dec. 190; *Breen v. Texas, etc., R. Co.*, 50 Tex. 43; *Thomp. Carr.*, 69, 70.

<sup>4</sup> *State v. Thompson*, 20 N. H. 250.

<sup>5</sup> *Chicago, etc., R. Co. v. Griffin*, 68 Ill. 499. See, also, *Illinois, etc., R. Co. v. Whittemore*, 43 Ill. 420; *Vedder v. Fellows*, 20 N. Y. 126; *Heap v. Day*, 34 W. R. 637, s. c. 51 J. P. 213.

<sup>6</sup> *Jerome v. Smith*, 48 Vt. 230.

<sup>7</sup> *Townsend v. New York Cent. R. Co.*, 56 N. Y. 295, s. c. 15 Am. R. 419; *Dunphy v. Erie, etc., R. Co.*, 42 N. Y.

passage, he can doubtless recover from the company in a proper action, and some of the courts permit a recovery upon the theory of a wrongful expulsion by the second conductor,<sup>1</sup> although it seems to us that the wrong consists in the act of the first conductor and the failure to transport the passenger.<sup>2</sup> Somewhat similar to conductors' checks on railroads are transfer tickets or checks given upon street cars. A regulation requiring a transfer check where the fare is paid upon one line and a transfer is permitted to another line for the one fare is reasonable and valid in the absence of any charter or statutory provision to the contrary, and the company is not liable for the ejection of a traveler who has entered a car on the second line, at a point or a time different from the reasonable time and place specified in his transfer check, and refuses to pay his fare.<sup>3</sup> So, as a general rule, it is the duty of a passenger who desires to avail himself of transfer privileges to obtain a proper transfer check, and the fact that the first conductor has given him the wrong check, or told him that he does not need any, will not necessarily entitle him to recover for an ejection by the conductor on the second line.<sup>4</sup> But it has been said that where a passenger makes a timely request for a transfer check and it is not given to him until just as he is leaving the car he is not bound by a condition therein making it his duty to examine it and see that it is correct.<sup>5</sup> So, it has been held that

Super. Ct. 128; *Yorton v. Milwaukee, etc., R. Co.*, 54 Wis. 234, s. c. 41 Am. R. 23; *Bradshaw v. South Boston R. Co.*, 135 Mass. 407; *Booth on Street Railways*, § 237.

<sup>1</sup> *Pittsburg, etc., R. Co. v. Hennigh*, 39 Ind. 509; *Palmer v. Railroad Co.*, 3 S. Car. 580, s. c. 16 Am. R. 750; *Burnham v. Grand Trunk R. Co.*, 63 Me. 298; *Toledo, etc., R. Co. v. McDonough*, 53 Ind. 289.

<sup>2</sup> *Yorton v. Milwaukee, etc., R. Co.*, 54 Wis. 234, s. c. 41 Am. R. 23; *Townsend v. New York Cent. R. Co.*, 56 N. Y. 295, s. c. 15 Am. R. 419; *Shelton v. Lake Shore, etc., R. Co.*, 29 Ohio St. 214.

<sup>3</sup> *Percy v. Metropolitan St. R. Co.*, 58 Mo. App. 75. See, also, *Heffron v. Detroit City R. Co.*, 92 Mich. 406, s. c. 52 N. W. R. 802.

<sup>4</sup> *Wakefield v. South Boston R. Co.*, 117 Mass. 544; *Bradshaw v. South Boston R. Co.*, 135 Mass. 407. See, also, *De Lucas v. New Orleans, etc., R. Co.*, 38 La. Ann. 930. But compare *Carpenter v. Washington, etc., R. Co.*, 121 U. S. 474, s. c. 7 Sup. Ct. R. 1002.

<sup>5</sup> *Laird v. Pittsburg, etc., R. Co.*, 166 Pa. St. 4, s. c. 31 Atl. R. 51. This decision is probably correct, but the soundness of the dictum referred to in the text is not beyond question.

notice must be given of a change in a well established method of transfer.<sup>1</sup>

§ 1603. **Fare paid on train.**—It is well settled, as we have elsewhere shown,<sup>2</sup> that a railroad company may enact and enforce a rule or regulation requiring a reasonably higher rate of fare to be paid upon the train than the ticket rate, provided it affords the passenger a reasonable opportunity to purchase a ticket. But it can not be fixed at such a sum that the fare collected on the train will exceed the maximum rate allowed by law.<sup>3</sup> So, in order to lawfully enforce such a rule or regulation, the railroad company must afford the passenger reasonable facilities for purchasing a ticket.<sup>4</sup> As a general rule, it should keep its ticket office open, with a competent person in attendance ready to sell tickets, a reasonable time before the

<sup>1</sup> *Consolidated Traction Co. v. Ta-born*, (N. J.) 32 Atl. R. 685. See, also, *Sheets v. Ohio River R. Co.*, 39 W. Va. 475, s. c. 20 S. E. R. 566, 2 Am. & Eng. R. Cas. (N. S.) 129.

<sup>2</sup> *Ante*, Vol. I, § 200. In addition to authorities there cited, see *McGowen v. Morgan's, etc.*, R. Co., 41 La. Ann. 732, s. c. 5 L. R. A. 817, and note; note to *Phettiplace v. Northern Pac. R. Co.*, 20 L. R. A. 483, 485; note to *Root v. Long Island R. Co.*, 11 Am. St. R. 643, 650; note to *Commonwealth v. Power*, 41 Am. Dec. 465, 473, *et. seq.* An extra charge of as much as twenty-five cents has been held reasonable, and a regulation may even require passengers to procure tickets as a condition to their right to ride on any terms. *McGowen v. Morgan's, etc.*, R. Co., 41 La. Ann. 732; *Poole v. Northern Pac. R. Co.*, 16 Ore. 261; *Finch v. Northern Pac. R. Co.*, 47 Minn. 36; *Pittsburgh, etc., R. Co. v. Van Dyne*, 57 Ind. 576, s. c. 26 Am. R. 68.

<sup>3</sup> *Zagelmeyer v. Cincinnati, etc., R. Co.*, 102 Mich. 214, s. c. 60 N. W. R.

436; *Railroad Co. v. Skillman*, 39 Ohio St. 444, s. c. 13 Am. & Eng. R. Cas. 31; *Chase v. New York, etc., R. Co.*, 26 N. Y. 523; *Lane v. East Tenn., etc., R. Co.*, 5 Lea (Tenn.) 124, s. c. 2 Am. & Eng. R. Cas. 278; *Louisville, etc., R. Co. v. Guinan*, 11 Lea (Tenn.) 98, s. c. 47 Am. R. 279. But where a rebate check is given for the extra amount such extra sum is not part of the fare or charge for transportation within the meaning of a statute fixing the maximum rate. *Reese v. Pennsylvania R. Co.*, 131 Pa. St. 422, s. c. 6 L. R. A. 529, 17 Am. St. R. 818.

<sup>4</sup> *Chicago, etc., R. Co. v. Parks*, 18 Ill. 460; *Illinois Cent. R. Co. v. Sutton*, 42 Ill. 438, s. c. 92 Am. Dec. 81; *Wilsey v. Louisville, etc., R. Co.*, 83 Ky. 511, s. c. 26 Am. & Eng. R. Cas. 258; *Jeffersonville R. Co. v. Rogers*, 38 Ind. 116, s. c. 10 Am. R. 103; *Central R., etc., Co. v. Strickland*, 90 Ga. 562; *Gulf, etc., R. Co. v. Fox*, (Tex.) 6 S. W. R. 569, 33 Am. & Eng. R. Cas. 543; *Nellis v. New York Cent. R. Co.*, 30 N. Y. 505; *Hall v. South Carolina R. Co.*, 28 S. Car. 261, s. c. 5 S. E. R. 623;



departure of each train according to the schedule,<sup>1</sup> but not necessarily up to the very instant the train moves,<sup>2</sup> or the time of actual departure where it is late.<sup>3</sup> A traveler does not, however, make a sufficient effort to obtain a ticket if he merely goes to the window of the ticket office in ample time, and, not seeing the agent there, immediately enters the car without making any effort to see if the agent was in the office or to attract his attention.<sup>4</sup> So, if he arrives too late to buy a ticket before the train starts, or if, for any reason, it is his own fault, and not the fault of the company, that he fails to get a ticket, he can not complain if he is expelled upon his refusal to pay the extra fare.<sup>5</sup> Nor does the mere fact that the conductor at first accepts a tender of the ticket rate, through mistake, but, within a reasonable time, demands the extra sum required of those who pay on the train, operate as a waiver of the rule or entitle the traveler to passage at the

Cleveland, etc., R. Co. v. Beckett, 11 Ind. App. 547, s. c. 39 N. E. R. 429; Indianapolis, etc., R. Co. v. Rinard, 46 Ind. 293; Chicago, etc., R. Co. v. Graham, 3 Ind. App. 28, s. c. 29 N. E. R. 170 (right to pay excursion rate on train where no opportunity to get a ticket). Forsee v. Alabama, etc., R. Co., 63 Miss. 66. *Contra* Crocker v. New London, etc., R. Co., 24 Conn. 249; Bordeaux v. Erie R. Co., 8 Hun (N. Y.) 579.

<sup>1</sup>Phettiplace v. Northern Pac. R. Co., 84 Wis. 412, s. c. 20 L. R. A. 483, and note; Illinois Cent. R. Co. v. Johnson, 67 Ill. 312; Poole v. Northern Pac. R. Co., 16 Ore. 261, s. c. 8 Am. St. R. 289; Fordyce v. Manuel, 82 Tex. 527; St. Louis, etc., R. Co. v. Myrtle, 51 Ind. 566; State v. Hungerford, 39 Minn. 6.

<sup>2</sup>Everett v. Chicago, etc., R. Co., 69 Ia. 15, s. c. 27 Am. & Eng. R. Cas. 98; State v. Hungerford, 39 Minn. 6, s. c. 34 Am. & Eng. R. Cas. 265.

<sup>3</sup>St. Louis, etc., R. Co. v. South, 43

Ill. 176, s. c. 92 Am. Dec. 103; Swan v. Manchester, etc., R. Co., 132 Mass. 116, s. c. 42 Am. R. 432, 6 Am. & Eng. R. Cas. 327. But a statutory provision requiring the office to be kept open for a certain time prior to the departure of each train means the actual departure. Porter v. New York Cent. R. Co., 34 Barb. (N. Y.) 353; Atchison, etc., R. Co. v. Dwelle, 44 Kan. 394, 34 Pac. R. 500, 44 Kan. 394, s. c. 44 Am. & Eng. R. Cas. 402; Missouri Pac. R. Co. v. McClanahan, 66 Tex. 530, s. c. 27 Am. & Eng. R. Cas. 82.

<sup>4</sup>Indianapolis, etc., R. Co. v. Kennedy, 77 Ind. 507, s. c. 3 Am. & Eng. R. Cas. 467.

<sup>5</sup>Lake Erie, etc., R. Co. v. Mays, 4 Ind. App. 413, s. c. 30 N. E. R. 1106. See, also, Union Pac. R. Co. v. Wolf, 54 Kan. 592, 38 Pac. R. 786; Hoffbauer v. Davenport, etc., R. Co., 52 Iowa 342; Chicago, etc., R. Co. v. Flagg, 43 Ill. 364; Swan v. Manchester, etc., R. Co., 132 Mass. 116, s. c. 42 Am. R. 432.

ticket rate.<sup>1</sup> In such a case, if the traveler refuses to pay the extra sum, the conductor may retain the fare for the distance already traveled but must give him back the residue before expelling him.<sup>2</sup> When travelers are afforded proper facilities for purchasing tickets, a rule that no fare shall be received upon the train unless the exact amount is tendered would doubtless be reasonable, and we suppose that, even in the absence of a specific regulation upon the subject, the tender of an unreasonably large bill, which the conductor could not be expected to change, would be insufficient in such a case.<sup>3</sup> A carrier has no lien on the person of a passenger for the fare. The price of transportation is a debt, and the carrier can not detain or imprison a passenger, after the transit is completed, for his failure to produce a ticket or pay his fare.<sup>4</sup>

§ 1604. When person riding on a pass is a passenger and when not.—The general rule is that a person riding on a railway train on a free pass, the possession of which was lawfully and rightfully obtained, is a passenger.<sup>5</sup> The possession of the pass must be lawful for if it was obtained by fraud or the wrong of the person attempting to use it he is not a pas-

<sup>1</sup> *Lake Erie, etc., R. Co. v. Mays*, 4 Ind. App. 413, s. c. 30 N. E. R. 1106; *Wardwell v. Chicago, etc., R. Co.*, 46 Minn. 514, s. c. 24 Am. St. R. 246, 47 Am. & Eng. R. Cas. 482, modifying *Du Lurans v. First Division St. Paul, etc., R. Co.*, 15 Minn. 49, s. c. 2 Am. R. 102. See, also, *McCarthy v. Chicago, etc., R. Co.*, 41 Iowa 432.

<sup>2</sup> *Wardwell v. Chicago, etc., R. Co.*, 46 Minn. 514. See, also, *Bland v. Southern Pac. R. Co.*, 55 Cal. 570, s. c. 36 Am. R. 50; note to *Toledo, etc., R. Co. v. Wright*, 34 Am. R. 277, 284.

<sup>3</sup> *Fulton v. Grand Trunk R. Co.*, 17 U. C. Q. B. 428. But the conductor must be prepared to furnish change to a reasonable amount. *Barrett v. Market St. R. Co.*, 81 Cal. 296, s. c. 22 Pac. R. 859. And the passenger must be given a reasonable time in which to pay. *Clark*

*v. Wilmington, etc., R. Co.*, 91 N. Car. 506. If he pays in counterfeit money, and on discovery of the counterfeit refuses to pay in good money, he may be expelled. *Memphis, etc., R. Co. v. Chastine*, 54 Miss. 503.

<sup>4</sup> *Lynch v. Metropolitan, etc., R. Co.*, 90 N. Y. 77. But, see, *Standish v. Narragansett, etc., Co.*, 111 Mass. 512.

<sup>5</sup> *Louisville, etc., R. Co. v. Faylor*, 126 Ind. 126; *Railroad Company v. Lockwood*, 17 Wall. 357; *Ohio, etc., R. Co. v. Muhling*, 30 Ill. 9, s. c. 81 Am. Dec. 336; *Missouri, etc., R. Co. v. Ivy*, 71 Tex. 409, 1 L. R. A. 500; *Doyle v. Fitchburg R. Co.*, 162 Mass. 66, s. c. 44 Am. St. R. 335; *Philadelphia, etc., R. Co. v. Derby*, 14 How. 468.

senger and the carrier owes him no duty as such.<sup>1</sup> Where an employe of the carrier is riding on a pass, his rights depend very largely upon the capacity in which he is riding. If he is riding on the pass in the performance of his duties as the employe of the company he is not a passenger and the care due to passengers is not due to him.<sup>2</sup> But where the employe is rightfully using a pass for his own personal convenience or for his own pleasure or business he is in most jurisdictions, regarded as a passenger and entitled to the care owing to passengers.<sup>3</sup> So, a drover accompanying his stock is a passenger notwithstanding a provision in his pass that he shall be regarded as an employe.<sup>4</sup> Postal clerks,<sup>5</sup> sleeping car por-

<sup>1</sup>The rule is thus expressed in the case of *Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442: "We accept as good law the doctrine of the decided cases, that one who fraudulently attempts to ride on a non-transferable pass issued to another person, is not a passenger to whom the carrier owes a duty to carry safely. A person who enters a train on a pass to which he has no right, can not, therefore maintain an action for injuries caused by the carrier's negligence. *Chicago, etc., R. Co. v. Michie*, 83 Ill. 427; *Toledo, etc., R. Co. v. Brooks*, 81 Ill. 245; *Toledo, etc., R. Co. v. Beggs*, 85 Ill. 80, 28 Am. R. 613; *Brown v. Missouri, etc., R. Co.*, 64 Mo. 536. This rule is founded on sound principle, since it is a fundamental doctrine of the law, that one who is guilty of a fraud can not enforce any rights arising out of his own wrong. It is also in close agreement with the rule that a carrier owes no duty to an intruder. *Nave v. Flack*, 90 Ind. 205, 46 Am. R. 205."

<sup>2</sup>See *ante*, § 1578. *Doyle v. Fitchburg, R. Co.*, 162 Mass. 66, s. c. 44 Am. St. R. 335. The company may of course, owe him some duty, it is not, however, the duty which a carrier owes to a passenger but is the

duty which an employer owes to an employe. *Texas, etc., R. Co. v. Smith*, 67 Fed. R. 524, s. c. 31 L. R. A. 321, and note.

<sup>3</sup>*Doyle v. Fitchburg R. Co.*, 162 Mass. 66, s. c. 44 Am. St. R. 335. See, also, *Ohio, etc., R. Co. v. Muhling*, 31 Ill. 9, s. c. 81 Am. Dec. 336; *Pembroke v. Hannibal, etc., R. Co.*, 32 Mo. App. 61; *Washburn v. Nashville, etc., R. Co.*, 3 Head (Tenn.) 638, s. c. 75 Am. Dec. 184; *Rosenbaum v. St. Paul, etc., R. Co.*, 38 Minn. 173.

<sup>4</sup>*Missouri, etc., R. Co. v. Ivy*, 71 Tex. 409, 1 L. R. A. 500.

<sup>5</sup>*Mellor v. Missouri Pac. R. Co.*, 105 Mo. 455, s. c. 14 S. W. R. 758, 16 S. W. R. 849; *Gulf, etc., R. Co. v. Wilson*, 79 Tex. 371, s. c. 15 S. W. R. 280; *Cleveland, etc., R. Co. v. Ketcham*, 133 Ind. 346, s. c. 33 N. E. R. 116. In *Norfolk, etc., R. Co. v. Shott*, (Va.) 22 S. E. R. 811, it was said: "It is established by the evidence that the plaintiff was an employe of the federal government, and was on the passenger train in the legitimate discharge of his duty as mail agent and postal clerk, under some contract between the government and the defendant company as to carrying the United States mail. The relation the plaintiff-

ters<sup>1</sup> and express messengers,<sup>2</sup> although riding on passes, have also been held to be passengers, so far as the duty to carry safely and the liability of the carrier for injuries to them is concerned.

§1605. **Drovers riding on passes.**—It is the almost universal custom of railway companies to issue to persons accompanying shipments of live stock what are known as drovers' passes, entitling them to ride to the point of shipment and return. The rule is that a person rightfully riding on a drover's pass is a passenger, and, while there is some slight conflict of authority, the weight of authority is to the effect that such a person is a passenger for hire.<sup>3</sup> Those authorities which hold that he is a passenger for hire rest on the theory that the charge paid for the transportation of the live stock which the holder of the pass

iff bore to the railroad company, as a common carrier, imposed upon the defendant company the same degree of care for the plaintiff that it was bound to exercise towards every passenger upon its train the plaintiff was in no sense an employe of the defendant company, and can only be treated as a passenger."

<sup>1</sup> *Jones v. St. Louis, etc., R. Co.*, 125 Mo. 666, s. c. 46 Am. St. R. 514, 28 S. W. R. 883. But we very much doubt whether sleeping car company porters can be regarded as passengers. As elsewhere shown, the railroad company is held liable for the assaults of such employes upon passengers on the ground that they are to be regarded as employes of such company and it seems inconsistent to hold that they are also passengers. It is probably true that where the sleeping car employes travel for their own convenience or business they are passengers, but we doubt whether they can be so regarded when traveling in discharge of the duties of their service.

<sup>2</sup> *Brewer v. New York, etc., R. Co.*,

124 N. Y. 59, s. c. 26 N. E. R. 324; *Kenney v. New York Cent., etc., R. Co.*, 125 N. Y. 422, s. c. 26 N. E. R. 626; *Fordyce v. Jackson*, 56 Ark. 594, s. c. 20 S. W. R. 528, 597. See, *ante*, § 1578, *post*, § 1608.

<sup>3</sup> *New York, etc., R. Co. v. Blumenthal*, 160 Ill. 40, 43 N. E. R. 809; *Missouri, Pac. R. Co. v. Ivy*, 71 Tex. 409, 1 L. R. A. 500; *Union, etc., R. Co. v. Shacklet*, 119 Ill. 232; *Carroll v. Missouri, etc., R. Co.*, 88 Mo. 239; *Griswold v. New York, etc., R. Co.*, 53 Conn. 371; *Railway Co. v. Stevens*, 95 U. S. 655; *Railroad Co. v. Lockwood*, 17 Wall. (U. S.) 357; *Quimby v. Boston, etc., R. Co.*, 150 Mass. 365, 40 Am. & Eng. R. Cas. 693; *Little Rock, etc., R. Co. v. Miles*, 40 Ark. 298, 13 Am. & Eng. R. Cas. 10; *Maslin v. Baltimore, etc., R. Co.*, 14 W. Va. 180; *Cleveland, etc., R. Co. v. Curran*, 19 Ohio St. 1, s. c. 2 Am. Rep. 362; *Virginia, etc., R. Co. v. Sayers*, (Va.) 26 Gratt. 328; *Ohio, etc., R. Co. v. Nickless*, 71 Ind. 271; *Ohio, etc., R. Co. v. Selby*, 47 Ind. 471; *Saunders v. Southern Pac. R. Co.*, (Utah) 44 Pac. 932.

accompanies covers also the transportation of such person and that the pass therefore is not a mere gratuity but a thing for which a valuable consideration was paid. Some of the authorities hold that he is a mere gratuitous passenger,<sup>1</sup> but we are inclined to the opinion that the authorities which hold that he is a passenger for hire rest upon the better reason. The relation of passenger and carrier between a drover and a railway company can not be changed to that of employe and employer by a provision in the pass to the effect that while accompanying his stock the drover shall be regarded as an employe of the road and the company shall be liable to him only in the capacity of employer.<sup>2</sup> While a drover riding on a pass is regarded as a passenger he is not to be regarded as a passenger to the extent of being entitled to all the privileges and conveniences to which a passenger riding on a first-class ticket is entitled. His rights must necessarily be and are limited on account of the inconveniences attending the running of the class of trains upon which live stock are carried, and for that reason it is held that he is not entitled to all the rights and privileges of passengers for hire riding upon passenger trains.<sup>3</sup>

**§ 1606. Duty to person riding on pass.**—The measure of duty owing from the carrier to a person riding on a pass depends upon the relation existing between the carrier and the person using the pass. The relation is the test for determin-

<sup>1</sup>*Poucher v. New York, etc., R. Co.*, 49 N. Y. 263; *Bissell v. New York, etc., R. Co.*, 25 N. Y. 442; *McCawley v. Furness R. Co.*, L. R. 8 Q. B. 57; *Gallin v. London, etc., R. Co.*, L. R., 10 Q. B. 212. See *Smith v. New York, etc., R. Co.*, 24 N. Y. 222.

<sup>2</sup>*Missouri Pac. R. Co. v. Ivy*, 71 Tex. 409, 1 L. R. A. 500.

<sup>3</sup>*Omaha, etc., R. Co. v. Crow*, (Neb.) 66 N. W. R. 21. In that case the court said: "In our view it was not proper to confer upon Mr. Crow the unlimited rights and privileges of or-

dinary passengers for hire. While he was, for certain purposes, a passenger, he was not such in the usual, unrestricted sense of that term. His contractual right was to proceed upon the freight train upon which his cattle were shipped, from Ord to South Omaha; his duty was to care for his stock in transit, and his rights and privileges as a passenger were limited by the necessity of traveling on the aforesaid freight train, and by the requirement that he should care for his stock."

ing the measure of duty. Thus where a person is riding on a pass as an employe of the carrier and in the performance of some service of the carrier only the duties due from a master to a servant are due to such person.<sup>1</sup> But where the person riding on a pass is regarded as a passenger the carrier usually owes to him the same degree of care that it owes to a passenger paying full fare.<sup>2</sup> In some of the states, however, as we shall hereafter show, it is held that a person riding on a free pass in which there is a stipulation against liability of the carrier for negligence is bound by the stipulation.<sup>3</sup> Where the possession of the pass on which the person is riding has been obtained by fraud he is not a passenger but a trespasser or intruder and the carrier owes no duty to protect him from its mere negligence,<sup>4</sup> for as a rule the carrier is only liable in such cases for wanton or willful wrongs. Where a drover is riding on a pass in a freight train the carrier is not bound to the same absolute or extraordinary degree of care as to his safety as it is to a passenger for hire riding pursuant to a ticket on regular passenger trains, for it is impossible for the company to care as well for a person riding on an ordinary freight train

<sup>1</sup> *Ante*, § 1578; *Doyle v. Fitchburg R. Co.*, 162 Mass. 66, s. c. 44 Am. St. R. 335.

<sup>2</sup> *Gulf, etc., R. Co. v. McGowan*, 65 Tex. 640, 26 Am. & Eng. R. Cas. 274; *Rose v. Des Moines Valley R. Co.*, 39 Iowa 246; *Philadelphia, etc., R. Co. v. Derby*, 14 How. (U. S.) 468; *Ohio, etc., R. Co. v. Nichless*, 71 Ind. 271; *Louisville, etc., R. Co. v. Faylor*, 126 Ind. 126; *Railroad Company v. Lockwood*, 17 Wall. 357; *New York, etc., R. Co. v. Blumenthal*, 160 Ill. 40, 43 N. E. R. 809; *Doyle v. Fitchburg R. Co.*, 162 Mass. 66, s. c. 44 Am. St. R. 335; *Jacobus v. St. Paul, etc., R. Co.*, 20 Minn. 125, s. c. 18 Am. R. 360; *Todd v. Old Colony, etc., R. Co.*, 3 Allen (Mass.) 18; *Abell v. Western, etc., R. Co.*, 63 Md. 433, 21 Am. & Eng. R. Cas. 503; *Little Rock, etc., R.*

*Co. v. Miles*, 40 Ark. 298; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291; *Chicago, etc., R. Co. v. Carpenter*, 56 Fed. R. 451; *Sanders v. Southern Pac. R. Co.*, (Utah) 44 Pac. R. 932.

<sup>3</sup> *Post*, § 1608. There is much strength in the reasoning of the cases referred to for it seems unjust to hold a railroad carrier to the same extraordinary measure of duty in a case where a pass is issued as a pure matter of grace, benevolence or charity as that to which it is held in a case where it receives a consideration for the carriage.

<sup>4</sup> *Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442; *Toledo, etc., R. Co. v. Beggs*, 85 Ill. 80, 28 Am. R. 613; *Brown v. Missouri, etc., R. Co.*, 64 Mo. 536.

as it is for one riding on a regular passenger train.<sup>1</sup> The same degree of care is due to a minor riding on a stock pass as to an adult.<sup>2</sup>

§ 1607. **Conditions in passes.**—Conditions are sometimes incorporated in or annexed to passes which require the person to whom the pass is issued to do some specified thing before he is entitled to ride on the pass or to conduct himself in a particular manner while being carried on the pass. These conditions, so long as they do not contravene any statute or principle of public policy, are held valid, and the holder of the pass is bound to comply with them. Thus, where there was a condition in a pass that the holder should sign the same, it was held that the provision was valid and that a holder who refused to comply with the condition was rightfully ejected from the train.<sup>3</sup> A condition in a drover's pass to the effect that he should "remain in the caboose car attached to the train while the same was in motion," is a valid and binding condition and does not contravene any law or a sound public policy.<sup>4</sup> A person who receives and uses a free pass is deemed to have consented to the conditions therein the same as if he had signed them,<sup>5</sup> and this has been held to be true whether he read the pass or not.<sup>6</sup>

1608. **Validity of stipulation exempting carrier from liability for negligence.**—Passes usually contain a stipulation which in terms exempts the carrier from liability for negligence. As to the validity of such stipulations the authorities are not

<sup>1</sup> Omaha, etc., R. Co. v. Crow, (Neb.) 66 N. W. R. 21. See Lake Shore, etc., R. Co. v. Brown, 123 Ill. 162. Perhaps it is not strictly correct to say that the carrier is not bound to the same degree of care, but it is obvious that the risks are greater in the one case than the other, and that the same precaution, in the way of appliances and the running of the trains, can not be taken.

<sup>2</sup> Texas, etc., R. Co. v. Garcia, 62 Tex. 285.

<sup>3</sup> Elliott v. Western, etc., R. Co., 58 Ga. 454.

<sup>4</sup> Ft. Scott, etc., R. Co. v. Sparks, 55 Kan. 288, 39 Pac. R. 1032.

<sup>5</sup> Gulf, etc., R. Co. v. McGowan, 65 Tex. 640, 26 Am. & Eng. R. Cas. 274; Quimby v. Boston, etc., R. Co., 150 Mass. 365, 23 N. E. R. 205, 1 Lewis' Am. R. & Corp. R. 113.

<sup>6</sup> Rogers v. Kinnebec Steamboat Co., 86 Me. 261, 29 Atl. R. 1069, s.c. 10 Lewis' Am. R. & Corp. R. 332.

agreed, some holding that they are valid and binding upon the person using the pass, others that they are not. In the majority of the states the courts hold that such a stipulation is void and not binding upon the person using the pass,<sup>1</sup> and that the carrier is liable for injuries negligently inflicted upon a person using a pass containing such a stipulation. But in the state of New York,<sup>2</sup> Washington,<sup>3</sup> and a number of other states,<sup>4</sup> such stipulations are held valid at least where the pass is gratuitous and the carrier exempted from liability from acts of negligence resulting in injury to the person using the pass. The rule in England is also to the effect that the carrier may make a valid contract exempting itself from liability for injuries negligently inflicted upon a person riding on a free pass.<sup>5</sup> The authorities which hold that such stipulations are invalid rest upon the doctrine that it is against public policy for one to contract exempting himself from liability for his future negli-

<sup>1</sup> *Railroad Co. v. Lockwood*, 17 Wall. 357; *Cleveland, etc., R. Co. v. Curran*, 19 Ohio St. 1; *Gulf, etc., R. Co. v. McGowan*, 65 Tex. 640, s. c. 26 Am. & Eng. R. Cas. 274; *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *Jacobus v. St. Paul, etc., R. Co.*, 20 Minn. 125, s. c. 18 Am. R. 360; *Railway Co. v. Stevens*, 95 U. S. 655; *Delaware, etc., R. Co. v. Ashley*, 67 Fed. R. 209; *Rose v. Des Moines, etc., R. Co.*, 39 Iowa 246; *Doyle v. Fitchburg R. Co.*, 162 Mass. 66, s. c. 44 Am. St. R. 335; *Carroll v. Missouri R. Co.*, 88 Mo. 239, s. c. 57 Am. R. 382; *Bryan v. Missouri Pac. R. Co.*, 32 Mo. App. 228; *Buffalo, etc., R. Co. v. O'Hara*, (Pa.) 9 Am. & Eng. R. Cas. 317. See *Thompson v. Yazoo, etc., R. Co.*, 47 La. Ann. 1107, s. c. 17 So. R. 503.

<sup>2</sup> *Wells v. New York, etc., R. Co.*, 24 N. Y. 181; *Poucher v. New York, etc., R. Co.*, 49 N. Y. 263; *Perkins v. New York, etc., R. Co.*, 24 N. Y. 196; *Ulrich v. New York, etc., R. Co.*, 108 N. Y. 80, s. c. 2 Am. St. R. 369.

In the case last cited it was held that the fact that a person riding on a free pass purchases a seat in a drawing-room car in which he rides, does not make him a passenger for hire so as to render the condition in his pass inoperative.

<sup>3</sup> *Muldoon v. Seattle, etc., R. Co.*, 7 Wash. 528, 22 L. R. A. 794, s. c. 35 Pac. R. 422, 9 Lewis' Am. R. & Corp. R. 715, and note.

<sup>4</sup> *Western, etc., R. Co. v. Bishop*, 50 Ga. 465; *Kinney v. Central R. Co.*, 32 N. J. L. 407; *Griswold v. New York, etc., R. Co.*, 53 Conn. 371, s. c. 4 Atl. R. 261, 1 Lewis' Am. R. & Corp. R. 122; *Quimby v. Boston, etc., R. Co.*, 150 Mass. 365, 23 N. E. R. 205; *Hosmer v. Old Colony R. Co.*, 156 Mass. 506, s. c. 31 N. E. R. 652; *Rogers v. Kennebec Steamboat Co.*, 86 Me. 261, 29 Atl. R. 1069; *Illinois Central R. Co. v. Read*, 37 Ill. 484, s. c. 87 Am. Dec. 260; *Annas v. Milwaukee, etc., R. Co.*, 67 Wis. 46; *post*, § 1644.

<sup>5</sup> *McCawley v. Furness R. Co.*, L. R. 8



gence.<sup>1</sup> The authorities which hold the stipulations valid and binding upon the person using the pass rest upon the theory that the carrier when it issues a mere gratuitous pass, and does a thing which the law does not require it to do, has a right to stipulate against liability, and that by so doing no principle of public policy is contravened.<sup>2</sup> In such a case since the person who receives the pass gets something which he is not entitled to demand it seems but just that the carrier may rightfully limit its liability, and that the person who receives the gratuity should assume the risk accompanying it. In some of the cases usually cited as opposed to this doctrine the pass was not in fact gratuitous, but for it some consideration, although indirect, was yielded, and it is evident that such cases are essentially different from cases in which a pass is issued as a mere gift, or donation. In most of the states it is held that if the pass is not a pure gratuity, but is one for which some consideration has been paid, then a stipulation against liability is void. Such is the rule, as we have seen, where passes have been issued to drovers or persons accompanying shipments to care for the same during transit. In such cases the

Q. B. 57; *Gallin v. London, etc., R. Co.*, L. R. 10 Q. B. 212; *Alexander v. Toronto, etc., R. Co.*, 33 U. C. Q. B. 474; *Hall v. Northeastern R. Co.*, L. R. 10 Q. B. 437; *Duff v. Great Northern R. Co.*, L. R. 4 Ir. 178.

<sup>1</sup> *Carroll v. Missouri R. Co.*, 88 Mo. 239, s. c. 57 Am. R. 382; *Mobile, etc., R. Co. v. Hopkins*, 41 Ala. 486; *Flinn v. Philadelphia, etc., R. Co.*, 1 *Houst. (Del.)* 469; *Gulf, etc., R. Co. v. McGowan*, 65 Tex. 640; *Missouri, etc., R. Co. v. Ivy*, 71 Tex. 409, 37 Am. & Eng. R. Cas. 46; *Ohio, etc., R. Co. v. Nickless*, 71 Ind. 271; *Graham v. Pacific R. Co.*, 66 Mo. 536; *Saunders v. Southern Pac. R. Co.*, (Utah) 44 Pac. R. 932; *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315. The rule is thus stated in the case of *Louisville, etc., R. Co. v. Faylor*, 126 Ind. 126: "A

stipulation that the carrier shall not be bound to the exercise of care and diligence is in effect an agreement to absolve him from one of the essential duties of his employment, and it would be subversive of the very object of the law to permit the carrier to exempt himself from liability by a stipulation in his contract with the passenger, that the latter should take the risk of the negligence of the carrier or his servants. The law will not allow the carrier thus to abandon his obligation to the public, and hence all stipulations which amount to a denial or repudiation of duties which are of the very essence of his employment will be regarded as unreasonable, contrary to public policy, and therefore void."

<sup>2</sup> *Quimby v. Boston, etc., R. Co.*, 150 Mass. 365, 5 L. R. A. 846; *Rogers v.*

pass is not a mere gratuity but one for which some consideration has been paid and hence the person using the pass may be justly regarded as a passenger for hire.<sup>1</sup> In some of the courts a distinction is made between the different degrees of negligence, the stipulation creating the exemption being held valid as to ordinary negligence but not as to gross negligence.<sup>2</sup>

§ 1609. **Injury to person riding on pass.**—It is obvious that the right to recover in an action for injuries received by a person traveling on a pass is not the same in all jurisdictions for, as we have seen, in some jurisdictions the validity of stipula-

Kennebec Steamboat Co., 86 Me. 261, 29 Atl. R. 1069, 25 L. R. A. 491. In the case of *Muldoon v. Seattle*, etc., R. Co., 7 Wash. 528, 22 L. R. A. 794, 38 Am. St. R. 901, it was said: "There can be no question as to the propriety of that rule of law which prohibits a common carrier from forcing upon any person who deals with it in its public capacity a condition against liability arising from its own negligence. The very idea of a public or common carrier, with its features of monopoly and right of eminent domain, bears with it to the modern mind, the duty of conveying passengers with safety, so far as its own acts are concerned, upon the payment of reasonable compensation. The duty which the carriers owes to the public and to the individual is to perform the service safely, without any limiting conditions; and, therefore, such conditions, when the imposition of them is attempted, violate an implied duty, and are justly held void. But when the intending passenger proposes to the carrier that it do something for him which it is not, under any conceivable circumstances, required by law or duty to do, viz: to carry him without any compensation whatever, and when the whole matter is at the option of either party to

agree or not, it is difficult to see why public policy should step in, and deny the right of the carrier to limit its chances of loss in the operation, even though a careless servant causes unintentional injury to a passenger."

<sup>1</sup> Delaware, etc., R. Co. v. Ashley, 67 Fed. R. 209; Railroad Co. v. Lockwood, 17 Wall. 357; Cleveland, etc., R. Co. v. Curran, 19 Ohio St. 1, s. c. 2 Am. R. 362; Little Rock, etc., R. Co. v. Miles, 40 Ark. 298, s. c. 48 Am. R. 10; Maslin v. Baltimore, etc., R. Co., 14 W. Va. 180, s. c. 35 Am. R. 748; Lawson v. Chicago, etc., R. Co., 64 Wis. 447, s. c. 54 Am. R. 634; Waterbury v. New York, etc., R. Co., 17 Fed. R. 671; Chicago, etc., R. Co. v. Carpenter, 56 Fed. R. 451; Saunders v. Southern Pac. R. Co., (Utah) 44 Pac. R. 932. In the state of New York it is held that a stipulation in a drover's pass exempting the company from liability is binding upon the holder and that the company is not liable for injuries negligently inflicted upon a person riding on such a pass. *Poucher v. New York, etc., R. Co.*, 49 N. Y. 263, s. c. 10 Am. R. 364. See *Gardner v. New Haven, etc., R. Co.*, 51 Conn. 143, s. c. 50 Am. R. 12.

<sup>2</sup> Illinois Cent. R. Co. v. Read, 37 Ill. 484; Pennsylvania R. Co. v. McCloskey, 23 Pa. St. 526; Arnold v. Illi-

tions exempting the carrier from liability is affirmed and in others denied.<sup>1</sup> The relation which the person using the pass bears to the railroad company is also an important element in determining the liability. If he is regarded as a passenger, then the company is bound to use "the highest practical degree of care," and, for a failure to use such care, it will be liable for all injuries proximately caused thereby.<sup>2</sup> But where the person using the pass is an employe, then the carrier will only be liable for such injuries as result from negligence in failing to perform the duties owing to employes.<sup>3</sup> Where the person using the pass has obtained possession thereof fraudulently he is a mere trespasser and the carrier will only be liable for wanton or willful wrongs.<sup>4</sup> A violation of the express provisions of the pass will often relieve the carrier from responsibility. Thus, where a drover's pass provides that the person using it shall ride in a particular part of the train such person will be guilty of contributory negligence if he violates his contract and occupies a position of greater danger and receives injury by reason of such violation.<sup>5</sup> The general rule is that where the holder of the pass is to be regarded as a passenger any act of negligence may give a right of action. Thus, where

nois Cent.R.Co., 83 Ill.273. See, also, *Annas v. Milwaukee, etc., R. Co.*, 67 Wis. 46, 27 Am. & Eng. R. Cas. 102. This distinction mentioned in the text was made in *Indiana, etc., R. Co. v. Mundy*, 21 Ind. 48, but in the later case of *Ohio, etc., R. Co. v. Selby*, 47 Ind. 471, the doctrine of the earlier case was denied and it was held that there are no degrees of negligence, citing *Railroad Co. v. Lockwood*, 17 Wall. 357; *Beal v. South Devon, etc., R. Co.*, 3 H. & C. 337; *Hinton v. Dibbin*, 2 Q. B. 646. As to what law governs the construction and effect of passes, see *Burnett v. Pennsylvania, etc., (Pa. St.)* 34 Atl. 972; *Camden, etc., Co. v. Causch, (Pa. St.)* 7 Alt. R. 371, 28 Am. & Eng. R. Cas. 142.

<sup>1</sup> *Ante*, § 1608.

<sup>2</sup> *Ohio, etc., R. Co. v. Muhling*, 30 Ill. 9; *Doyle v. Fitchburg R. Co.*, 162 Mass. 66, 44 Am. St. R. 335; *Louisville, etc., R. Co. v. Faylor*, 126 Ind. 126. Assuming, of course, that the person injured is not guilty of contributory negligence.

<sup>3</sup> *Ante*, § 1578; *Doyle v. Fitchburg R. Co.*, 162 Mass. 66, s. c. 44 Am. St. R. 335.

<sup>4</sup> *Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442.

<sup>5</sup> *Richmond, etc., R. Co. v. Pickleseimer*, 85 Va. 798, s. c. 89 Va. 389; *Chicago, etc., R. Co. v. Hawk*, 36 Ill. App. 327; *McCorkle v. Chicago, etc., R. Co.*, 61 Iowa 555; *Tuley v. Chicago, etc., R. Co.*, 41 Mo. App. 432; *Atchi-*

a passenger riding on a pass was injured by a jerk of the bell cord the company was held liable.<sup>1</sup> So, too, the kind of train on which the pass entitles the holder to travel is sometimes a matter of importance, for, as we have shown, one who is entitled to ride only on freight trains assumes some risks that passengers on regular passenger trains do not assume.

§ 1610. **Person other than the one entitled to use a pass riding thereon—Fraud.**—Passes are usually issued to a person named therein and entitle that person, and no other, to be carried thereon.<sup>2</sup> It sometimes happens that passes are presented for transportation by persons other than the person to whom they are issued. Where a pass is presented by a person other than the person to whom it was issued the rule is that the person presenting it is not entitled to any rights under it and if he refuses to pay his fare he may be rightfully ejected from the train. Attempting to ride on a pass which has been issued to another person is a fraud upon the company and the company owes no further duty to such person than to refrain from willfully injuring him.<sup>3</sup> The fact that there is a slight error in the name contained in the pass is not conclusive evidence that there is fraud on the part of the person pre-

son, etc., *R. Co. v. Lindley*, 42 Kan. 714, s. c. 6 L. R. A. 646.

<sup>1</sup>*Thompson v. Yazoo, etc., R. Co.*, 47 La. Ann. 1107, s. c. 17 So. R. 503. The party using the pass in this case was held not to have been guilty of contributory negligence because he saw the bell cord jerking some few minutes before he was injured and did not move away from it.

<sup>2</sup>The grant of a "free pass" to a person specifically designated therein is really the grant of a personal privilege, and a pass designating the person to whom it is issued, can not, as we believe, be considered as assignable although there is no express stipulation forbidding its transfer.

<sup>3</sup>*Louisville, etc., R. Co. v. Thomp-*

*son*, 107 Ind. 442, and cases cited. In *Toledo, etc., R. Co. v. Beggs*, 85 Ill. 80, s. c. 28 Am. Rep. 613, where a person was injured while riding on a pass issued to another person, it was said: "But the most interesting and important question remains. Was defendant in error a passenger on this train, in the true sense of the term? He was traveling on a free pass issued to one James Short, and not transferable, and passed himself as the person named in the pass. By his fraud he was riding on the car. Under such circumstances the company could only be held liable for gross negligence, which would amount to willful injury."

senting the pass,<sup>1</sup> nor that he is not entitled to travel thereon. If a person having no right to a pass presents it and refuses to pay fare the company may eject him from the train. Thus, where a newspaper publisher represented to a railway company that a certain person was in his employ, when in fact he was not, and the company issued a thousand mile book to such person entitling him to be carried for that distance free of charge, it was held that such transportation was secured by fraud and that the person presenting the mileage book might rightfully be ejected.<sup>2</sup> It was also held that the ejection was rightful, notwithstanding the fact that the person expelled from the train had made several trips on the mileage book before any question of fraud was made by the company.

§ 1611. **Contract to give passes.**—Railway companies often make contracts to give some particular person or persons passes over their line for a specified time. In many instances railroad companies have agreed with land owners that, as consideration for the grant of the right of way, they will issue passes to them. It is obvious that such agreements have all the elements of a contract, and they have been upheld in a great number of cases.<sup>3</sup> Contracts are often made to issue passes over the line of road, the building of which is contem-

<sup>1</sup> *Rice v. Illinois, etc., R. Co.*, 22 Ill. App. 643.

<sup>2</sup> *Moore v. Ohio River R. Co.*, (W. Va.) 23 S. E. R. 539; *Brown v. Missouri, etc., R. Co.*, 64 Mo. 536. Where a person who was injured was a reporter on a newspaper, and was riding on a non-transferable pass issued to another employe of the same paper, it was held proper to submit evidence to the jury that the railroad company was accustomed to carry other reporters of the same paper on a pass issued to one reporter. *Great Northern R. Co. v. Harrison*, 10 Exch. 376, 26 Eng. L. & Eq. 443.

<sup>3</sup> *Western Maryland R. Co. v. Lynch*, (Md.) 34 Atl. R. 40; *Dodge v. Boston*,

*etc., R. Co.*, 154 Mass. 299, s. c. 28 N. E. R. 243; *Erie, etc., R. Co. v. Douthet*, 88 Pa. St. 243, s. c. 32 Am. R. 451; *Weatherford, etc., R. Co. v. Wood*, 88 Tex. 191, 28 L. R. A. 526; *Martin v. New York, etc., R. Co.*, 36 N. J. Eq. 109, s. c. 12 Am. & Eng. R. Cas. 448; *Ruddick v. St. Louis, etc., R. Co.*, 116 Mo. 25, 22 S. W. R. 499; *Eddy v. Hinnant*, 82 Tex. 354, 18 S. W. R. 562; *Helton v. St. Louis, etc., R. Co.*, 25 Mo. App. 322; *Grimes v. Minneapolis, etc., R. Co.*, 37 Minn. 66, 31 Am. & Eng. R. Cas. 123; *Cook v. Milwaukee, etc., R. Co.*, 36 Wis. 45; *Dickey v. Kansas City, etc., R. Co.*, 122 Mo. 223, s. c. 26 S. W. R. 685; *ante*, § 946.

plated at the time, or over a line which has been previously built, and, as a rule, the contract will not be construed to extend to roads which may thereafter be leased or otherwise acquired, and hence the person entitled to such a pass has no right to one over after acquired roads.<sup>1</sup> Where the pass is granted to a person and his family, it means the members of his immediate family, those living in his house and under his control; it does not extend to the person's grand-child, who does not live with him.<sup>2</sup> A very important question in regard to contracts to give passes in consideration of the conveyance of a right of way or the like, is whether or not the obligation to give the pass is such a one as runs with the land so as to bind the successors of the railway company making the contract. Where the contract is a mere verbal contract, the rule is that the obligation to furnish a pass is not binding upon the contracting railway company's successor.<sup>3</sup> So, even where the contract is in writing and is made a part of the instrument by which the right of way which forms the consideration for the contract is conferred upon the company, it has been held that the obligation to furnish a pass does not run with the land and will not become binding upon a succeeding company unless there is some condition in the contract providing for forfeiture or the like.<sup>4</sup> A covenant in such a contract to give a pass is held not to be a covenant to do something in reference to the land and therefore is not binding upon subsequent grantees,<sup>5</sup> but it has been held that

<sup>1</sup> *Western Maryland R. Co. v. Lynch*, 34 Atl. R. 40.

<sup>2</sup> *Dodge v. Boston, etc., R. Co.*, 154 Mass. 299, s. c. 28 N. E. R. 243.

<sup>3</sup> *Martin v. New York, etc., R. Co.*, 36 N. J. Eq. 109, s. c. 12 Am. & Eng. R. Cas. 448; *Dallas, etc., R. Co. v. Maddox*, (Tex. Civ. App.) 31 S. W. R. 702.

<sup>4</sup> *Eddy v. Hinnant*, 82 Tex. 354, 18 S. W. R. 562; *Ruddick v. St. Louis, etc., R. Co.*, 116 Mo. 25, 22 S. W. R. 499, 57 Am. & Eng. R. Cas. 290. But see *Helton v. St. Louis, etc., R. Co.*, 25 Mo. App.

322, in which it was held that where a land owner conveyed a right of way in consideration of a free pass for life and the road was sold under a mortgage the lien for the pass still continued.

<sup>5</sup> In *Dickey v. Kansas City, etc., R. Co.*, 122 Mo. 223, s. c. 26 S. W. R. 685, it was said: "Moreover, the covenant to furnish plaintiff and his family perpetual passes over the line of the railroad does not run with the land, because foreign to it, and in no manner connected with the land."

such grantees take with notice of conditions which may be expressed in instruments on record and are therefore bound by them.<sup>1</sup> What we have said, would, of course, not be applicable where the grantee assumed to perform the contract made by its grantor. Where the obligation does not become binding upon the grantee the ordinary remedy is an action for damages against the company with whom the contract was made.<sup>2</sup> It has been held, however, that the plaintiff may invoke specific performance of a contract to issue him a pass.<sup>3</sup> It has also been held that a contract to give a pass for a certain number of years, or for life, is not such a contract as falls within the class of contracts not to be performed within a year, so as to bring it within the statute of frauds. The contract, being a personal one, may be terminated in less than a year by the death of the parties entitled to the pass.<sup>4</sup> Receivers can not, by verbal contract, agree to give a person a pass for life and make such contract binding beyond the term of the receivership.<sup>5</sup>

§ 1612. **Interstate commerce law.**—The interstate commerce law prohibits those carriers of passengers which fall within its provisions from issuing free passes except to particular persons. The law, of course, is not applicable to carriers which operate roads wholly within one state or issue passes to be used within the limits of a single state. This provision of the law in reference to passes has been strictly construed wherever it has been before the courts. Thus, it has been held that the provision which permits the issuing of passes to officers and employes does not apply to their families and that the issuing of passes to the families of employes or officers is a violation

<sup>1</sup> *Ruddick v. St. Louis, etc., R. Co.*, 116 Mo. 25, 22 S. W. R. 499.

<sup>2</sup> *Eddy v. Hinnant*, 82 Tex. 354, 18 S. W. R. 562. As to the measure of damages for breach of a contract to furnish a pass for life, see *Erie, etc., R. Co. v. Douthit*, 88 Pa. St. 243, s. c. 32 Am. R. 451.

<sup>3</sup> *Bettridge v. Great Western R. Co.*, 3 Grant Err. & App. (U. C.) 58.

<sup>4</sup> *Weatherford, etc., R. Co. v. Wood*, 88 Tex. 191 28 L. R. A. 526.

<sup>5</sup> *Martin v. New York, etc., R. Co.*, 36 N. J. Eq. 109, s. c. 12 Am. & Eng. R. Cas. 448.

of the law.<sup>1</sup> Before the passage of the interstate commerce law passes were frequently sought by and issued to persons who occupied some official position or had high social standing and influence. The issuing of passes to the class of persons named above is prohibited by the interstate commerce law.<sup>2</sup> It is held to be a violation of the law to issue a free pass to a person who is not an employe but requests a pass as compensation "for throwing business to the carrier."<sup>3</sup> A railway official who issues a pass to any person not within the exceptions of that law is

<sup>1</sup> *Ex parte Kohler*, 31 Fed. R. 315, 1 Interstate Com. Com. R. 317, s. c. 29 Am. & Eng. R. Cas. 44.

<sup>2</sup> *In re Boston, etc.*, R. Co., 5 Int. St. Com. Com. R. 69; *Harvey v. Louisville, etc.*, R. Co., 5 Int. St. Com. Com. R. 153; *In re Boston, etc.*, R. Co., 3 Int. St. Com. Rep. 717. See *Tuttle v. Northern Pac. R. Co.*, 1 Int. Com. Rep. 483, 588. The interstate commerce commission will not adjudicate upon the question of issuing passes to a particular class of persons in the absence of an actual case. *Re United States Commission of Fish and Fisheries*, 1 Int. Com. Rep. 606.

<sup>3</sup> *Slater v. Northern Pac. R. Co.*, 2 Int. Com. R. 243. In this case it was said: "Carriers can reward persons not in their stated and regular employment for occasional services, or for benefits indirectly received, in other and better ways than by furnishing them with free transportation. Some of the evils which resulted from former methods were referred to in the first annual report of this commission (see 1 Int. St. Com. Rep. 654) and others might be named. It may be said that a pass costs the carrier little or nothing, and that when the good will and occasional words of a person who is able to influence the direction of traffic can be obtained so cheaply it is a hardship to prevent the carrier from making use of the oppor-

tunity; but the evils in the unrestricted employment of free passes by common carriers had grown so great and had become so apparent, both to the public and to the carriers themselves, that it was deemed by congress to be absolutely necessary to eradicate the whole system from interstate commerce in order to put an end to the abuses which had grown beyond the limits of any other regulation or control. The law was framed accordingly, prohibiting the giving of free transportation to passengers carried under substantially similar circumstances and conditions, as an unjust discrimination, under the general terms employed, with only the exceptions made in section 22, that: 'Nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers or employes or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employes.' If any person who is in a position to render a common carrier a service or a favor by kind words or by useful paragraphs can be properly considered to be an 'employe' the exception may easily become broader than the rule; that word is evidently here employed in its ordinary signification."



guilty of a violation thereof and may be punished.<sup>1</sup> But where passes were issued to a discharged employe who never used them and they expired by limitation while in his hands it was held that since no transportation of any one had ever taken place on the passes there was no unjust discrimination.<sup>2</sup>

§ 1613. Statutes prohibiting the granting of passes.—In addition to the interstate commerce law prohibiting the granting of free passes to be used for transportation between different states some of the states have passed statutes or have constitutional provisions prohibiting the issuing of passes to certain persons to be used within the limits of such states. Such a provision is found in the constitution of Washington. There the constitution prohibits carriers from issuing passes to public officers. But where an officer voluntarily accepts and uses a free pass he will be estopped to question the validity of the conditions therein, for that would be to permit him to take advantage of his own wrong.<sup>3</sup> In the state of New York there is a constitutional provision prohibiting the issuing of free passes to public officers. The provision just referred to applies to a notary public who is appointed by the governor of the state, but whose term of office and duties are fixed by law.<sup>4</sup> It has also been held that an officer who received a free pass before the constitutional provision went into effect is prohibited from thereafter using it, but as elsewhere shown, the cases are in conflict upon this point.<sup>5</sup> An interesting case arose under the New York constitution as to whether or not a railroad policeman was entitled to a free pass. The plaintiff had entered into a contract with the defendant railway company to act as a railroad policeman for it and the contract provided that he was to receive a free pass over the lines of the railway

<sup>1</sup> *In re Charge to Grand Jury*, 66 Wash. 311, 38 Pac. R. 995, 45 Am. St. Fed. Rep. 146; *United States v. Cleveland, etc.*, R. Co., 3 Interst. Com. Com. Rep. 290. R. 787.

<sup>4</sup> *People v. Rathbone*, 145 N. Y. 434, s. c. 28 L. R. A. 384.

<sup>2</sup> *Griffie v. Burlington, etc.*, R. Co., 2 Int. Com. Rep. 194.

<sup>5</sup> *People v. Rathbone*, 145 N. Y. 434, s. c. 28 L. R. A. 384.

<sup>3</sup> *Muldoon v. Seattle, etc.*, R. Co., 10

company. The contract having been made before the provision of the constitution prohibiting the granting of passes to public officers was adopted, on the adoption of the provision the railway company refused to give the plaintiff a free pass on the ground that he was a public officer. Suit was brought to compel the issuing of a pass and it was held that although the plaintiff was a public officer, he was entitled to a pass under his contract.<sup>1</sup> The court held that the pass issued to him was not a free pass and that he was entitled to it as part of the consideration agreed to be paid him for his services.

§ 1614. **Rights of persons holding passes to be carried in sleeping and parlor cars.**—So far as we have been able to discover there is no case or authority which precisely defines the right of a person holding a free railroad pass to be carried in sleeping and parlor cars. The right of a person to be carried in such cars may, perhaps, depend upon the terms of the contract contained in the pass, so that it is difficult to state a general rule. If the pass provided that the holder should have no right to be carried in a sleeping or parlor car we believe that such a provision would be valid, for a railway company certainly has the right to give to a person, who paid full and regular compensation, the benefit of first choice of sleeping and parlor cars, to the exclusion of those to whom it grants a privilege.<sup>2</sup> Where a pass is silent on the subject, and there is no rule or regulation to the contrary, there is more difficulty, but we are inclined to the opinion that a person traveling on a pass would have a right to be carried in parlor and sleeping cars on paying the compensation for carriage in those cars.<sup>3</sup>

§ 1615. **Baggage of person riding on pass.**—It has been held that unless there be some stipulation or condition in a

<sup>1</sup> *Dempsey v. New York, etc., R. Co.*, 146 N. Y. 290, s. c. 40 N. E. R. 867.

<sup>2</sup> See *Muldoon v. Seattle, etc., R. Co.*, 10 Wash. 311, s. c. 45 Am. St. R. 787.

<sup>3</sup> We suppose that a railroad company may make reasonable rules and regulations on the subject, and that a person accepting a pass would be bound to conform to them.

pass in reference to the baggage of a person riding thereon such person is a passenger and entitled to the rights of a passenger and has a right to have his baggage carried by the carrier on the same terms upon which the baggage of passengers for hire is carried. But it is within the power of the carrier to make a contract governing the carriage of the baggage of persons riding on passes and where such stipulations are incorporated in a pass they are valid and binding upon the person using the pass, and, as we believe, the right of a holder of a pass to have baggage carried may be limited by rules or regulations.<sup>1</sup> It seems clear, it may be said generally, that a person who accepts a gratuitous pass must take it on the terms and conditions on which the donor chooses to bestow it, unless such terms or conditions violate some rule of law or public policy.

<sup>1</sup> *Muldoon v. Seattle, etc.*, R. Co., 10 Wash. 311, 45 Am. St. R. 787. The liability of the company as to baggage so carried is held to be merely that of a gratuitous bailee. *Rice v. Illinois Cent. R. Co.*, 22 Ill. App. 643; *Flint, etc., R. Co. v. Weir*, 37 Mich. 111.

## CHAPTER LXVIII.

### SLEEPING CAR COMPANIES.

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| <p>§ 1616. General nature of sleeping car companies.</p> <p>1617. Duty to furnish accommodations.</p> <p>1618. Duties and liabilities of sleeping car and parlor car companies—Generally.</p> <p>1619. Refusal to furnish berth—Right of railroad company to determine on what trains or tickets sleeping car berths shall be furnished.</p> <p>1620. Tickets—Berths.</p> <p>1621. Duties of sleeping car companies to passengers—Illustrative instances.</p> | <p>§ 1622. Duty as to property of passengers.</p> <p>1623. Baggage of passengers—Loss of—Negligence.</p> <p>1624. Contributory negligence — Loss of baggage or property.</p> <p>1625. Relation of railroad companies to passengers traveling in sleeping car or parlor car.</p> <p>1626. Railroad companies may require compensation for sleeping car accommodations.</p> <p>1627. Limiting liability—Contract—Notice.</p> |
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§ 1616. General nature of sleeping car companies.—It is affirmed by the authorities that a sleeping car company is neither a common carrier nor an innkeeper,<sup>1</sup> but precisely

<sup>1</sup> *Post*, §§ 1618, 1622. "Liability of Sleeping Car Companies for the Property of Passengers," 1 Am. & Eng. R. Cas. (N. S). xxxviii; Legal Status of Sleeping Car Companies, 19 Am. L. Rev. 204. "The Liability of Sleeping Car and Palace Car Companies for Injuries to Passengers, 3 Columbia L. T. 93. "Sleeping Cars," 22 Cent. L. J. 52; Notes to Mann, etc., Co. v. Dupre, 21 L. R. A. 289; Whitney v. Pullman Palace Car Co., 26 Am. L. Reg. 366; Lewis v. New York Central, etc., Co., 26 Am. L. Reg. 359; Pullman, etc., Co. v. Gaylord, 26 Am. L. Reg. 512; Notes to Pullman, etc., Co. v. Lowe, 29 Am. L. R. 251; Notes to Pullman, etc., Co. v. Lowe, 30 Central L. J. 245; Ray Negligence of Imposed Duties, Passenger Carriers, 3; Hutchinson on Carriers, §§ 677-719; Schouler on Carriers, 421-429; Thompson on Carriers of Passengers, 489-539; 3 Wood on Railways, (Minor's, ed.) 1697, 22 Am. & Eng. Ency. of Law, 3. Where a sleeping car company without authority leases its property it may recover it back as there is no moral wrong in the transaction. Pullman, etc., Co. v. Central, etc., Co., 65 Fed. R. 158.

what its character is has not been very satisfactorily explained or described. The rules as to the rights, duties and liabilities of such companies have not as yet been very fully declared by the courts nor the doctrines which govern such organizations very fully developed.<sup>1</sup> Sleeping car companies do not undertake to carry passengers but they do assume a duty of a special nature to the persons to whom they agree to furnish "additional accommodations." Public carriers are not bound to furnish places to sleep nor luxurious seats or the like, for their duty as carriers is to furnish, on trains provided for the carriage of passengers, reasonable accommodations for the comfort and convenience of those they undertake to carry. The additional accommodations are furnished by sleeping car companies or parlor car companies, and for those accommodations compensation is paid such companies. Such companies do not undertake to furnish tracks, locomotives or the like, nor do they undertake to govern or control the movement of trains or any matters connected with the operation of the road, so that it can not be justly said that as to any of such matters they owe a duty to their patrons. But while the duty of such companies to their patrons is neither that of an innkeeper nor that of a public carrier there is, nevertheless, some special duty, (not as yet very clearly defined by the decisions) inasmuch as they exact and receive a compensation for furnishing travelers with what are commonly called "additional accommodations," and correspondent to this duty there must, upon well settled principles, be some liability for a breach of duty to the persons to whom that duty is owing, and who are injured in person or property by a wrongful violation of such duty.

§ 1617. **Duty to furnish accommodations.**—The courts must, as we suppose, take judicial notice that sleeping car companies do not undertake to furnish accommodations to all persons who desire them in the broad sense that public carriers undertake to carry all persons who properly offer themselves for transportation.<sup>2</sup> Sleeping car companies have not the same

<sup>1</sup> See *post*, § 1618.

gratuitous pass to demand a berth in

<sup>2</sup> As to the right of the holder of a in a sleeping car, see *ante*, § 1614.

control of facilities for transportation as railroad companies have and they do not hold themselves out as undertaking to accommodate all who desire accommodations such as they assume to furnish, and it can not be justly held that their duty is as broad as that of railroad carriers. It is difficult to say what is the scope and extent of their duty to furnish accommodations to those who demand them, but we think it safe to say that as they are, to some extent, at least, "affected with a public interest," they are under a duty to serve the public impartially and to exercise reasonable care to furnish the required service. There must be some public duty otherwise such public carriers as railroad companies would have no right to haul the cars of sleeping car companies as parts of regular railway passenger trains. But while there seems to be a duty on the part of a sleeping car company to treat all persons impartially who desire accommodations and to exercise reasonable care to provide such accommodations we do not think that the duty is so broad or so closely analogous to that of a railroad company as the expressions of some of the courts seem to indicate.<sup>1</sup> A sleeping car company can not, however, arbitrarily and without cause refuse to receive a passenger who properly offers himself and requests accommodations,<sup>2</sup> but it may, of course, refuse to receive an unfit person or may for other sufficient reasons decline to receive a passenger into its coaches.

§ 1618. Duties and liabilities of sleeping car and parlor car companies—Generally.—The acceptance of compensation for accommodations in a sleeping car or parlor car, as we have said, creates contractual relations between the company and its patron, and out of this relation a duty arises. The nature of the service rendered by sleeping car companies is public, and they are in some measure instrumentalities of interstate commerce,<sup>3</sup> and hence considerations of public policy have

<sup>1</sup> *Nevin v. Pullman, etc., Co.*, 106 Ill. 222, s. c. 46 Am. R. 688, 11 Am. & Eng. R. Cas. 92.

<sup>2</sup> *Searles v. Mann, etc., Co.*, 45 Fed. R. 330.

<sup>3</sup> They are regarded for the purposes of taxation as instrumentalities of commerce. *Pullman, etc., Co. v. Board*, 55 Fed. R. 206; *Board v. Pullman, etc., Co.*, 60 Fed. R. 37.

weight in determining what their obligations are and the general character of their duties. We think that principle requires the conclusion that in all matters peculiar to sleeping cars and their appurtenances, a sleeping car company owes to those with whom it contracts a special and distinct duty. If, for example, the sleeping car company should negligently place a traveler in a berth previously occupied by one suffering from a contagious disease the sleeping car company and not the railroad company, unless guilty of concurrent negligence, is responsible to the traveler injured by such negligence, for it can not be justly said that as to things peculiarly and exclusively pertaining to sleeping car accommodations the railroad company owes the traveler a duty. It is probably true that the decisions, or, more accurately speaking, the *dicta* contained in many of them, oppose our conclusion, but, for all that, we believe that as to exclusively "additional accommodations," that is, accommodations especially furnished by the sleeping car company and in no way connected with the carriage of the passenger, the special duty is owing to the traveler by the sleeping car company. We do not doubt that the weight of authority is that a railroad company, as well as the sleeping car company, is liable for assaults committed by sleeping car conductors and porters upon passengers,<sup>1</sup> nor do we say that the decisions so declaring are not well founded, but we do venture to say that they can only be sustained upon the ground that the duty of furnishing fit and competent servants and of requiring of them a proper service is a matter connected with the carriage of passengers and not a matter exclusively pertaining to the undertaking to furnish "additional accommodations" in the form of places for sleeping or the like. Nor do we controvert the soundness of the doctrine declared by the cases which hold that a railroad company is liable for in-

<sup>1</sup>Dwinelle v. New York, etc., R. R. Cas. 414; Heenrich v. Pullman, Co., 120 N. Y. 117, s. c. 24 N. E. R. etc., Co., 20 Fed. R. 100; Thorpe v. 319, 2 Am. R. & Corp. R. (Lewis) 492; New York, etc., Co., 76 N. Y. 402, s. c. 32 Am. R. 325. See, generally, 451; Williams v. Pullman, etc., Co., Pullman, etc., Co. v. Bales, 80 Tex. 40 La. Ann. 417, s. c. 33 Am. & Eng. 211, s. c. 14 S. W. R. 855.

juries caused by defects in sleeping cars,<sup>1</sup> for it is the duty of the railroad company as a public carrier to exercise the highest practicable degree of care to procure safe cars and equipments and to keep them in a safe condition for use. While we readily agree to the doctrine of the cases referred to, we, nevertheless, think that a sleeping car company may also be liable for negligently using an unsafe or defective car,<sup>2</sup> for we can see no reason for exonerating a natural person or a corporation who undertakes for a consideration to furnish a traveler with sleeping accommodations from responsibility for negligence, although it may be true that the negligence of some one else concurs in causing the injury. Although a railroad company may be liable for assaults committed upon passengers by the employes of a sleeping car company the injured person has a right of action against the sleeping car company.<sup>3</sup>

**§ 1619. Refusal to furnish berth—Right of railroad company to determine on what trains or tickets sleeping car berths shall be furnished.**—The general principle discussed in a former chapter that railroad companies may determine on what trains passengers shall be carried authorizes the conclusion that a railroad company may classify its trains and determine on what trains sleeping car accommodations shall be furnished.<sup>4</sup> There is no duty to furnish such accommodations on all trains, so that it must ordinarily be within the power of the railroad company to determine on what trains sleeping cars shall be handled. A passenger can not maintain an action for a refusal to furnish a sleeping car berth on trains on

<sup>1</sup> *Pennsylvania Co. v. Roy*, 102 U. S. 451; *Dwinelle v. New York, etc., Co.*, 120 N. Y. 117, s. c. 8 L. R. A. 224; *Thorpe v. New York, etc., Co.*, 76 N. Y. 406; *Kinsley v. Lake Shore, etc., R. Co.*, 125 Mass. 54, s. c. 28 Am. R. 200.

<sup>2</sup> *Williams v. Pullman, etc., Co.*, 40 La. Ann. 417, s. c. 33 Am. & Eng. R. Cas. 414.

<sup>3</sup> *Campbell v. Pullman, etc., Co.*, 42 Fed. R. 484.

<sup>4</sup> In *State v. Missouri, etc., R. Co.*, 55 Kan. 708, s. c. 49 Am. St. 278, will be found an instructive discussion of the general discretionary power of railroad companies. See, also, *State v. Kansas, etc., R. Co.*, 47 Kan. 497.



which such accommodations are not furnished, nor can a passenger not entitled to such accommodations because not holding such a ticket as entitles him to such accommodations maintain an action for a refusal to furnish him a berth.<sup>1</sup> It is held that the agent of a railroad company who is also employed to sell tickets for a sleeping car company acts as the agent of the railroad company in selling such tickets in cases where the railroad company determines what persons shall occupy the sleeping car and that no recovery can be had against the sleeping car company for the wrongful refusal of such agent to sell an intending passenger a berth.<sup>2</sup>

§ 1620. *Tickets—Berths.*—The rule that a ticket does not fully express the contract, and is in the nature of “a voucher” or “token,” is applied to “berth tickets” issued by sleeping car companies.<sup>3</sup> In one of the reported cases it was held competent for the sleeping car company to contradict by parol the terms of a ticket as to the berth bought by the passenger,<sup>4</sup> but this seems to us an erroneous ruling for we believe that the statements of the ticket as to the particular berth purchased can not be contradicted for the reason that as to that fact the ticket expresses the agreement of the parties even though it may not express the entire contract. If the rule asserted in the case referred to is the correct one then a traveler who undertakes a night ride upon a ticket sold him by the agent of the company may be induced to enter upon a journey that may result in injury to him although his ticket by its terms assures him that he will receive such accommodations and that he has a right to a particular berth. In another case it was held that a person who buys a ticket entitling him to a designated berth has a right to that berth or to a similar berth in another car

<sup>1</sup> *Lawrence v. Pullman, etc., Co.*, 144 Mass. 1, s. c. 28 Am. & Eng. R. 151; *etc., Co.*, 143 Mass. 267, 9 N. E. R. 615.

*Pullman, etc., Co. v. Lee*, 49 Ill. App. 75. <sup>4</sup> *Mann, etc., Co. v. Dupre*, 54 Fed. R. 646, citing *New York, etc., R. Co. v. Winter's Admr.*, 143 U. S. 60, s. c. 12 Sup. Ct. R. 356.

<sup>2</sup> *Lemon v. Pullman, etc., R. Co.*, 52 Fed. R. 262.

<sup>3</sup> *Ante*, § 1593; *Lewis v. New York,*

and that for a failure to furnish such a berth an action will lie.<sup>1</sup> So it is held by other courts that a demand for a berth and a promise to furnish it constitute a contract between the sleeping car company and the passenger by whom the berth is engaged for a breach of which the sleeping car company is liable in damages.<sup>2</sup> A sleeping car company has a right to sell an entire section to one passenger and no action will lie against it because of the refusal of its employes to permit another traveler to take an unoccupied berth therein.<sup>3</sup> A passenger who purchases a ticket for a berth really buys a right to a designated place in the car and can not justly claim a right to any other, hence it is correctly held that he has no right to occupy any other berth except the one he purchases.<sup>4</sup> Where a passenger accepts a free pass from the railroad company, the purchase by him of a ticket for a seat in a drawing-room car does not make him a passenger of the railroad company for hire.<sup>5</sup> It has been held that a passenger who buys a ticket from the agent of a sleeping car company which is subsequently lost, and, after its loss, receives from the agent of the company a written statement reciting that he holds a seat in a designated train and car, and indicating that the ticket has been lost is entitled to damages for being compelled to travel in an ordinary car attached to the same train.<sup>6</sup> In another case the question as

<sup>1</sup> Pullman, etc., Co. v. Taylor, 65 Ind. 153.

<sup>2</sup> Pullman, etc., Co. v. Booth, (Tex. Civ. App.) 28 S. W. R. 719, citing *Nevin v. Pullman Car Co.*, 106 Ill. 222; *Missouri, etc., R. Co. v. Evans*, 71 Tex. 361, s. c. 9 S. W. R. 325.

<sup>3</sup> *Searles v. Mann, etc., Co.*, 45 Fed. R. 330.

<sup>4</sup> Pullman, etc., Co. v. Bales, 80 Tex. 211, s. c. 14 S. W. R. 855; *Searles v. Mann, etc., Co.*, 45 Fed. R. 330.

<sup>5</sup> *Ulrich v. New York, etc., R. Co.*, 108 N. Y. 80.

<sup>6</sup> *Buck v. Webb*, 58 Hun 185. We are inclined to think that the decision in the case referred to is erroneous

for, as it seems to us, a passenger must know that the ticket which the company authorizes its agent to sell is the evidence to the conductor of the sleeping or parlor car of the right of the passenger to a particular seat or berth. If the agent should give such a statement to a person not entitled to the berth or seat, although he should act in entire good faith and with all possible care, it would certainly not avail the company in an action by the holder of the ticket in the event that it should turn out that the agent was mistaken and the person to whom the statement was given had not bought a ticket.

to the rights of a passenger who had lost his ticket for a berth came under consideration and it was held that the company was liable for the expulsion of a passenger who had lost his ticket but had received a written statement from the agent of the company showing that he had bought a ticket for a designated berth.<sup>1</sup>

§ 1621. **Duties of sleeping car companies to passengers—**  
**Illustrative instances.**—A sleeping car company owes a duty to its patrons to make reasonable provision for their convenience and comfort, but a patron can not successfully insist that his comfort or convenience shall be paramount to the reasonable rules of the company nor to the rights of other passengers.<sup>2</sup> It is held that a railroad conductor is not bound to arouse from sleep a passenger whom he knows is to leave the train at a designated station,<sup>3</sup> but that it is the duty of the employes of a sleeping car company to awaken a passenger in time to get off the train at the place where it is known he desires to stop.<sup>4</sup> There is good reason for making a distinction between the classes of cases referred to, for the particular duty to awaken a sleeping passenger is clearly implied in the general duty to provide him with sleeping accommodations to a designated station. We think that a sleeping car company would be liable to a passenger injured through the negligence of its employes in the management of the heating apparatus of its car.<sup>5</sup> In a case where a passenger was wrongfully expelled from a sleeping car because of a fear that he was suffering from small pox,

<sup>1</sup> Pullman, etc., Co. v. Reed, 75 Ill. 125, s. c. 20 Am. R. 232.

<sup>2</sup> Pullman, etc., Co. v. Ehrman, 65 Miss. 383, s. c. 4 So. R. 113.

<sup>3</sup> Sevier v. Vicksburg, etc., R. Co., 61 Miss. 8; Nunn v. Georgia R. Co., 71 Ga. 710.

<sup>4</sup> Pullman, etc., Co. v. Smith, 79 Tex. 468, s. c. 23 Am. St. R. 356, citing Pullman, etc., Co. v. Pollock, 69 Tex. 120, s. c. 5 Am. St. R. 31; Pullman, etc., Co. v. Matthews, 74 Tex. 654, s. c.

15 Am. St. R. 873. The case first cited recognizes the difference between the duty of a railroad company and the duty of a sleeping car company.

<sup>5</sup> Pullman, etc., Co. v. Barker, Colo. 344. The decision in the case referred to is erroneous so far as regards the measure of damages, and some of the statements as to the general liability of a sleeping company are probably too strong.

the court held that if the removal was by the employes of the railroad company that company was liable, but that if the ejection was by the employes of the sleeping car company then that company was liable,<sup>1</sup> but, while there is good reason for the conclusion asserted in the case referred to, it seems to be opposed to the weight of authority, for the weight of authority asserts a rule that would hold the railroad company liable, although the passenger was ejected by the employes of the sleeping car company. The theory of the cases which hold that the railroad company is liable for assaults committed by the employes of sleeping car companies seems to be that the passenger has a right to assume that the train is all under one management and that it is the duty of the railroad company to procure fit and competent servants and to see that they do no injury to passengers no matter whether the passengers travel in sleeping coaches or in other cars attached to the train. We suppose it clear, however, that a railroad company would not be liable for an assault committed by an employe of a sleeping car company if such employe was at the time acting in some matter wholly outside of any duty connected with the management of the train. As a sleeping car company does not undertake to carry passengers it is not liable where the failure to transport the car in which a passenger secured a berth to its destination is caused by the act of the railway company.<sup>2</sup> Where a person admitted to a sleeping car is known to the employes of the sleeping car company to be violently insane it is culpable negligence on the part of the employes to permit him to remain and thus endanger the safety of others, and the company is liable for injuries to a passenger inflicted by such an insane person.<sup>3</sup> In the case referred to it was held that the duty to remove the insane person rested upon the sleeping car company and that the trial court erred in not instructing the jury

<sup>1</sup> *Paddock v. Atchinson, etc., R. Co.*, 37 Fed. R. 841.

<sup>2</sup> *Duval v. Pullman, etc., R. Co.*, 62 Fed. R. 265.

<sup>3</sup> *Meyer v. St. Louis, etc., Co.*, 54 Fed. R. 116, citing *Putnam v. Broadway, etc., R. Co.*, 55 N. Y. 108; *Pearson v. Duane*, 4 Wall. 605.

that the company had "the right, if need arose," to restrain or eject from the car the insane person.<sup>1</sup>

§ 1622. **Duty as to property of passengers.**—There is a slight conflict of authority as to the duty of a sleeping car company to protect the property of passengers who occupy berths in one of its cars. Some of the courts hold that the duty is substantially that of an innkeeper and therefore absolute,<sup>2</sup> but the very decided weight of authority is that such companies are liable only where the loss is attributable to the negligence of their employees.<sup>3</sup> The failure of the employees of a sleeping car company to exercise ordinary and reasonable care constitutes negligence and fastens a liability upon the company, unless the negligence of the passenger contributed to the loss.<sup>4</sup> The sleeping car company must, as we have said, exer-

<sup>1</sup> It has often been held that a railroad carrier is not bound to receive an insane person as a passenger. *Wood on Railroads*, 1035; *Hutchinson on Carriers*, § 540.

<sup>2</sup> *Pullman, etc., Co. v. Lowe*, 28 Neb. 239, s. c. 40 Am. & Eng. R. Cas. 637; *Louisville, etc., R. Co. v. Katzenberger*, 16 Lea 380.

<sup>3</sup> *Mann, etc., Co. v. Dupre*, 54 Fed. R. 646, s. c. 21 L. R. A. 289, notes; *Lemon v. Pullman, etc., Co.*, 52 Fed. R. 262; *Barrott v. Pullman, etc., Co.*, 51 Fed. R. 796; *Stearn v. Pullman, etc., Co.*, 8 Ontario 171, s. c. 21 Am. & Eng. R. Cas. 443; *Welch v. Pullman, etc., Co.*, 16 Alb. Pr. R. N. S. 352; *Carpenter v. New York, etc., Co.*, 124 N. Y. 53; *Tracy v. Pullman, etc.*, 67 How. Pr. 154; *Palmeter v. Wagner, etc., Co.*, 11 Alb. L. J. 149 note; *Pullman, etc., Co. v. Freudenstein*, 3 Colo. App. 540, s. c. 34 Pac. R. 578, 58 Am. & Eng. R. Cas. 589; *Kates v. Pullman, etc., Co.*, (Ga.) 23 S. E. R. 186; *Pullman, etc., Co. v. Smith*, 73 Ill. 360; *Pullman, etc., Co. v. Bluhm*, 109 Ill. 20; *Woodruff, etc., Co. v.*

*Diehl*, 84 Ind. 474, s. c. 9 Am. & Eng. R. Cas. 294; *Hillis v. Chicago, etc., Co.*, 72 Iowa 228, s. c. 31 Am. & Eng. R. Cas. 108; *Pullman, etc., Co. v. Gaylord*, 23 Am. L. Reg. (N. S.) 788; *Whitney v. Pullman, etc., Co.*, 143 Mass. 243; *Illinois, etc., Co. v. Handy*, 63 Miss. 609; *Scaling v. Pullman, etc., Co.*, 24 Mo. App. 29; *Root v. New York, etc., Co.*, 28 Mo. App. 199; *Bevis v. Baltimore, etc., Co.*, 26 Mo. App. 19; *Pfaelzer v. Pullman, etc., Co.*, 4 Weekly N. C. 240; *Keith v. Pullman's Palace Car Co.*, 17 Chicago Legal News 196; *Pullman, etc., Co. v. Gavin*, 93 Tenn. 53, s. c. 21 L. R. A. 298; *Blum v. Southern Pullman, etc., R. Co.*, 1 Flip. (U. S. C. C.) 500, 13 Alb. L. J. 221, note, 3 Central L. J. 591; *Pullman, etc., Co. v. Matthews*, 74 Tex. 654; *Pullman, etc., Co. v. Pollock*, 69 Tex. 120; *Dugan v. Pullman, etc., Co.*, 2 Tex. App. (Civil Cases) 607, s. c. 26 Am. & Eng. R. Cas. 149.

<sup>4</sup> *Stevenson v. Pullman, etc., Co.*, (Tex. Civ. App.) 26 S. W. R. 112, 32 S. W. R. 335; *Lewis v. New York, etc., R. Co.*, 143 Mass. 267, s. c. 28 Am.

cise reasonable care to protect the property of its patrons, and reasonable care requires that it should exercise care and diligence to employ a reasonable number of trustworthy servants to give reasonable care to the protection of the property, and also to see to it that such servants exercise ordinary care and diligence in the performance of their duties.<sup>1</sup> As it is the duty of a sleeping car company to employ competent and trustworthy servants it necessarily follows that the company is liable to a passenger for the loss of money or property stolen by one of its employes.<sup>2</sup> The decisions go so far, indeed, as to hold the company liable where the theft is by a fellow passenger or by an intruder,<sup>3</sup> but we suppose that where the theft is by a fel-

& Eng. R. Cas. 148; Woodruff, etc., Co. v. Diehl, 84 Ind. 474, s. c. 9 Am. & Eng. R. Cas. 294; Pullman, etc., R. Co. v. Gardner, 3 Pennypacker 78, s. c. 16 Am. & Eng. R. Cas. 324, 18 Cent. L. J. 14; Pullman, etc., Co. v. Gaylord, 23 Am. L. Reg. (N. S.) 788. In *Kates v. Pullman, etc., Co.*, (Ga.) 23 S. E. R. 186, it is held to be the duty of a sleeping car company to exercise ordinary care to discover and restore to the passenger property left by him in the car. In the case referred to the wrong of the company prevented the passenger from giving due care and attention to his property so that it can not be said that the decision denies the applicability or effect of the doctrine of contributory negligence.

<sup>1</sup> *Lewis v. New York, etc., Co.*, 143 Mass. 267; *Blum v. Southern, etc., Co.*, 1 Flippin (U. S.) 500; Woodruff, etc., Co. v. Diehl, 84 Ind. 474; Pullman, etc., Co. v. Martin, 92 Ga. 161, s. c. 58 Am. & Eng. R. Cas. 583; *Carpenter v. New York, etc., Co.*, 124 N. Y. 53, 47 Am. & Eng. R. Cas. 421, 11 L. R. A. 759; *Palmeter v. Wagner, etc., Co.*, 11 Alb. J. 149, note; *Root v. New York, etc., Co.*, 28 Mo. App. 199; *Wilson v. Baltimore, etc., Co.*, 32 Mo. App. 682;

*Scaling v. Pullman, etc., Co.*, 24 Mo. App. 29; *Pullman, etc., Co. v. Bluhm*, 109 Ill. 20. See, generally, *Barrott v. Pullman, etc., Co.*, 51 Fed. R. 796, s. c. 52 Am. & Eng. R. Cas. 498; *Pullman, etc., Co. v. Pollock*, 69 Tex. 120; *Welch v. Pullman, etc., Co.*, 16 Alb. Pr. (N. S.) 352, 13 Alb. L. J. 221; *Pullman, etc., Co. v. Matthews*, 74 Tex. 654; *Illinois, etc., Co. v. Handy*, 63 Miss. 609; *Root v. New York, etc., Co.*, 28 Mo. App. 199; *Crozier v. Boston, etc., Co.*, 43 How. Pr. 466; *Pullman, etc., Co. v. Gaylord*, (Ky.) 23 Am. L. Reg. (N. S.) 788.

<sup>2</sup> *Pullman, etc., Co. v. Martin*, 95 Ga. 314, 22 S. E. R. 700; *Pullman, etc., Co. v. Gavin*, 93 Tenn. 53, s. c. 23 S. W. R. 70, 21 L. R. A. 298; *Carpenter v. New York, etc., Co.*, 124 N. Y. 58, s. c. 11 L. R. A. 759; *Root v. New York, etc., Co.*, 28 Mo. App. 199. See, also, authorities cited in preceding notes.

<sup>3</sup> *Pullman, etc., Co. v. Gavin*, 93 Tenn. 53, s. c. 23 S. W. R. 70, 11 L. R. A. 298; *Carpenter v. New York, etc., Co.*, 124 N. Y. 58, s. c. 11 L. R. A. 759; *Mann, etc., Co. v. Dupre*, 54 Fed. R. 646, s. c. 21 L. R. A. 289; *Pullman, etc., Co. v. Matthews*, 74 Tex. 654.

low passenger or an intruder there is no liability unless the employes of the company were guilty of negligence. The modern doctrine that a principal is liable for the willful acts of the agent or employe requires the conclusion that a sleeping car company is liable for the torts of its employes although committed in disobedience of instructions. A sleeping car company is responsible for baggage or property lost through its negligence or by the theft of one of its employes where the property or baggage is carried by, or is directly in charge of one of the members of a family in cases where the family is traveling together.<sup>1</sup> It can not be justly affirmed that a sleeping car company is liable for all money or property which a passenger may choose to take into the car with him, for there must be, as there is even in the case of a public carrier of passengers, a limit to the liability of such a company. We think that a sleeping car company may be liable for such an amount of money as a passenger may take into the car with him for the purpose of defraying all the expenses incident to his journey, but not for money carried for purposes wholly disconnected with his journey or its incidents.<sup>2</sup> Generally, the right of action for the loss of property through the torts of the employes of a sleeping car company is in the person to whom a berth is sold, and it has even been held that such a person may maintain an action for money stolen from him by an employe of the sleeping car company although the money belonged to another and was entrusted to the passenger by the owner.<sup>3</sup>

§ 1623. **Baggage of passengers—Loss of—Negligence.**—The settled rule is that where a passenger actually entrusts his bag-

<sup>1</sup> Pullman, etc., Co. v. Gavin, 93 Tenn. 53, s. c. 21 L. R. A. 298. We venture to suggest that it seems doubtful whether a sleeping car company owes a duty to any person except the one with whom it contracts, and that it can hardly be said to be responsible for the property of a stranger although in the custody of the person with whom it has contracted.

<sup>2</sup> Blum v. Southern, etc., Co., 3 Cent. L. J. 591.

<sup>3</sup> Pullman, etc., Co. v. Gavin, 93

Tenn. 53, s. c. 21 L. R. A. 298. We venture to suggest that it seems doubtful whether a sleeping car company owes a duty to any person except the one with whom it contracts, and that it can hardly be said to be responsible for the property of a stranger although in the custody of the person with whom it has contracted.

gage to the custody of the railroad company and does not himself retain the possession or care of it, the railroad company receives it as a common carrier and is liable for its loss irrespective of the question of negligence, but where the passenger himself retains possession of his baggage the railroad company is not liable unless it was guilty of negligence. This general rule it is evident can not fully apply to a sleeping car company for the reason that it is neither a common carrier nor an innkeeper, but we think that the rule in so far as it relates to the possession of the baggage by the passenger himself does exert an important influence upon the question of the liability of a sleeping or parlor car company.<sup>1</sup> Our conclusion is that where the passenger takes his baggage into the coach with him and does not place it in charge of the railroad company or of the sleeping car company that neither company is liable unless the loss of the baggage was caused by the negligence of one of the companies.<sup>2</sup> We concur in the opinion of a writer who says: "A sleeping car company invites passengers to bring with them such baggage as is necessary for their personal comfort and impliedly contracts to use reasonable care in the protection of such baggage as in the protection of passengers but not further."<sup>3</sup> There is some diversity of opinion as to where the burden of proof rests in cases where the loss of the baggage is proved, some of the cases holding that the burden is on the sleeping car company<sup>4</sup> and others that it is on the pas-

<sup>1</sup> *Welch v. Pullman, etc., Co.*, 1 Sheld. (N. Y.) 457, s. c. 16 Abbott Pr. (N. S.) 352.

<sup>2</sup> *Blum v. Southern, etc., R. Co.*, 1 Flipp. (U. S.) 500, s. c. 3 Cent. L. J. 591; *Pullman, etc., R. Co. v. Smith*, 73 Ill. 360; *Pullman etc., R. Co. v. Freudenstein*, 3 Colo. App. 540, s. c. 58 Am. & Eng. R. Cas. 589; *Hillis v. Chicago, etc., R. Co.*, 72 Iowa 228, 31 Am. & Eng. R. Cas. 108.

<sup>3</sup> *Liability of Sleeping Car Companies for Property of Passengers*, Emilin McClain, 1 Am. & Eng. R. Cas. (N. S.) xxxviii, citing *Blum v. Southern, etc., R. Co.*, 1 Flippen, (U. S.)

500, 3 Cent. L. J. 591; *Woodruff, etc., Co. v. Diehl*, 84 Ind. 474; *Lewis v. New York, etc., R. Co.*, 143 Mass. 267; *Root v. New York, etc., R. Co.*, 28 Mo. App. 199; *Wilson v. Baltimore, etc., R. Co.*, 32 Mo. App. 682; *Barrott v. Pullman, etc., R. Co.*, 51 Fed. R. 796, s. c. 52 Am. & Eng. R. Cas. 498.

<sup>4</sup> *Voss v. Cleveland, etc., R. Co.*, (Ind. App.) 43 N. E. R. 20; *Kates v. Pullman, etc., Co.*, (Ga.) 23 S. E. R. 186; See *Lewis v. New York, etc., R. Co.*, 143 Mass. 267; *Pullman, etc., R. Co. v. Freudenstein*, 3 Colo. App. 540, s. c. 58 Am. & Eng. R. Cas. 589.



senger.<sup>1</sup> It seems to us that the true rule is that where the passenger, although he takes his luggage into the car with him, actually places it in charge of the employes of the sleeping car company, the burden is on the company to exonerate itself from the imputation of negligence and that proof of loss, after such delivery, makes a *prima facie* case but that where the passenger retains charge or custody of the luggage the burden is on him and he can not recover unless he proves that there was negligence on the part of the employes of the sleeping car company. Where the passenger retains custody of his baggage he has peculiar knowledge of the facts, and, according to decisions in analogous cases, ought to make proof of negligence. The principle which places the burden of proof upon a shipper where he has charge of live stock is closely analogous to that which governs the subject under immediate discussion, and requires the conclusion we have affirmed.

§ 1624. **Contributory negligence—Loss of baggage or property.**—A passenger who takes baggage or property into a sleeping or parlor coach with him is bound to exercise reasonable diligence and care to prevent its loss. If the loss is caused by the negligence of the passenger an action will not lie against the company.<sup>2</sup> Where, however, the passenger rightfully places his property or baggage in the charge and custody of the employes of the sleeping car company the passenger is not, as we believe, bound to exercise active diligence to protect his property, but in order to relieve himself of the duty to use care and diligence he must actually place his property in the charge and custody of the employes of the company.

<sup>1</sup> *Carpenter v. New York, etc., R. Co.*, 124 N. Y. 53, s. c. 47 Am & Eng. R. Cas. 421; *Stearns v. Pullman Car Co.*, 8 Ont. 171; *Dargan v. Pullman, etc., Co.*, 2 Tex. App. (Civil Cases) 607.

<sup>2</sup> *Chamberlain v. Pullman, etc., Co.*, 55 Mo. App. 474; *Efron v. Wagner, etc., Co.*, 59 Mo. App. 641; *Whitney v. Pullman, etc., Co.*, 143 Mass. 243; *Illinois, etc., Co. v. Handy*, 63 Miss.

609; *Henderson v. Louisville, etc., R. Co.*, 20 Fed. R. 430; *Henderson v. Louisville, etc., R. Co.*, 123 U. S. 61, s. c. 8 Sup. Ct. R. 60; *Pullman, etc., Co. v. Pollock*, 69 Tex. 120; *Talley v. Great Western R. Co.*, L. R. 6 C. P. 44; *Root v. New York, etc., R. Co.*, 28 Mo. App. 199; *Watkins v. Rymill*, L. R. 10 Q. B. D. 178. See, generally, *Burke v. Southeastern, etc., Co.*, L. R. 5 C. P. Div. 1.

§ 1625. **Relation of railroad companies to passengers traveling in sleeping car or parlor car company coaches.**—In general sleeping car or parlor car companies are distinct organizations from railroad companies and the coaches of the latter are simply hauled as part of a train by the former,<sup>1</sup> and the former ordinarily furnishes the coaches, equipments and servants, having direct and full control of the employment and discharge of employes as well as of their conduct and duty. It would seem, therefore, that there is reason for affirming that a railroad company is not always liable for the misconduct or negligence of a sleeping car company or its employes, insomuch as it is an elementary principle of the law of agency that the rule of *respondeat superior* does not apply where the person sought to be held responsible does not control those who are alleged to be agents or servants. But the relation between a railroad company and a sleeping car company is a peculiar one for the reason that the one company undertakes to carry the passenger and receives the compensation for carriage while the other company simply undertakes to furnish additional accommodations and only receives compensation for such additional accommodations. There is, therefore, reason for holding that so far as concerns the duty of carriage the railroad company alone undertakes it and is responsible for a breach of that duty. But to go further and hold that the railroad company is responsible for any and all wrongs, misconduct or negligence of the sleeping car company or its servants is to carry the doctrine beyond the line marked out by fundamental principles.<sup>2</sup> While we think it clear that so far as the obligations arising out of the duty of carriage are concerned the railroad company is responsible for injuries caused by the negligence of its own employes as well as those of the sleeping car company we think, nevertheless, that there may be negligence of the sleeping

<sup>1</sup> A railroad company may, however, itself furnish "additional accommodations." *Post*, § 1626.

<sup>2</sup> It seems to us notwithstanding the trend of authority that some of the

decisions violate the rules in reference to independent contractors and also trench upon the principle outlined in the maxim *respondeat superior*.

car company for which the railroad company can not be justly held responsible.<sup>1</sup> So far as concerns the duty of carriage a railroad company can not relieve itself from responsibility by employing or contracting with other companies, but, on the contrary, as that duty is imposed upon it by law it is answerable to a passenger who sustains an injury as a proximate consequence of its breach.<sup>2</sup> The principle, discussed in another connection, that common carriers can not escape liability by contracting with fast freight lines, despatch companies or the like,<sup>3</sup> applies to contracts with sleeping or parlor car companies and on that principle it is rightly adjudged that although a person takes passage in a sleeping or parlor car or coach the relation of carrier and passenger exists between him and the railroad company. The general rule that for injuries to passengers resulting from negligence in the operation of the train or from defects in the roadbed or the like the railroad company is liable is, therefore, entrenched by sound principle.<sup>4</sup>

§ 1626. Railroad companies may require compensation for sleeping car accommodations.—While it is at present true that, as a general rule, sleeping car,<sup>5</sup> parlor car or drawing-

<sup>1</sup> *Ante*, §§ 1618, 1621. *Voss v. Cleveland, etc., R. Co.*, (Ind. App.) 43 N. E. R. 20.

<sup>2</sup> *Pennsylvania Co. v. Roy*, 102 U. S. 451; *Kinsley v. Lake Shore, etc., R. Co.*, 125 Mass. 54, s. c. 28 Am. R. 200; *Bevis v. Baltimore, etc., Co.*, 26 Mo. App. 19; *Hillis v. Chicago, etc., R. Co.*, 72 Iowa 228, s. c. 31 Am. & Eng. R. Cas. 108; *Thorpe v. New York, etc., R. Co.*, 76 N. Y. 402, s. c. 32 Am. R. 325; *Dwinelle v. New York, etc., R. Co.*, 120 N. Y. 117, s. c. 44 Am. & Eng. R. Cas. 384.

<sup>3</sup> *Ante*, § 1453.

<sup>4</sup> *Cleveland, etc., R. Co. v. Walrath*, 38 Ohio St. 461, s. c. 8 Am. & Eng. R. Cas. 371; *Williams v. Pullman, etc., Co.*, 40 La. Ann. 417, s. c. 33 Am. & Eng. R. Cas. 414; *Texas, etc., Co. v. Curry*, 64 Tex. 85, s. c. 21 Am. & Eng.

*R. Cas.* 448; *Pennsylvania, etc., Co. v. Roy*, 102 U. S. 451; *Kinsley v. Lake Shore, etc., R. Co.*, 125 Mass. 54; *Louisville, etc., R. Co. v. Katzenberger*, 16 Lea 380, s. c. 57 Am. R. 232. In *Norfolk, etc., R. Co. v. Lipscomb*, 90 Va. 137, s. c. 17 S. E. R. 809, 20 L. R. A. 817, it was held that the railroad company was liable for cutting off the sleeper from the train and leaving it on a side-track late at night without notice to the passengers carrying off the baggage of a passenger, the train thus taking medicine and other articles needed for a sick child.

<sup>5</sup> We have for the sake of brevity and convenience employed the term "Sleeping Car Companies," as including "palace car companies," "boudoir companies," and "parlor car companies." There is really very little, if

room car accommodations are furnished by independent companies it does not follow by any means that a railroad company may not itself furnish such accommodations and make an additional charge therefor. As elsewhere said, a railroad carrier is bound to furnish those whom it accepts as passengers on its passenger trains with reasonable facilities for their comfort and convenience but is not bound to furnish such additional accommodations as are usually supplied by sleeping car companies. It results from this principle that, although a railroad company may own and operate chair cars, parlor cars, or the like it is bound to admit only passengers who pay the charges for accommodations in such cars.<sup>1</sup> This is certainly true where the railroad company furnishes sufficient ordinary cars for the carriage of passengers, but it is held that where such cars are not furnished a passenger may ride in a parlor car without the payment of additional compensation.<sup>2</sup> The purchase of a ticket entitling a passenger to carriage does not, at least where the railroad company has provided ordinary and reasonable facilities for its passengers, entitle the passenger to travel in a sleeping car without paying additional compensation, although such passenger may not have notice of the rules of the company.<sup>3</sup>

§ 1627. **Limiting liability—Contract—Notice.**—Very much the same principles must govern the right of sleeping car companies to limit their liability as those which govern the right of public carriers of passengers to limit their liability, for, as we have shown, sleeping car companies are so far entrusted with duties of a public nature as to bring them within the general rules which apply to carriers, telegraph companies, telephone companies and the like. A public carrier of passengers may contract for exemption from liability, provided always that the stipulations of the contract do not contravene

any, difference in the legal principles governing such companies.

<sup>1</sup> *Railway Co. v. Hardy*, 55 Ark. 134, s. c. 17 S. W. R. 711.

<sup>2</sup> *Thorpe v. New York, etc., R. Co.*, 76 N. Y. 402, s. c. 32 Am. R. 325.

<sup>3</sup> *Maroney v. Old Colony R. Co.*, 106 Mass. 153.

some rule of law or public policy. It is well settled that a railroad carrier of passengers can not effectively contract for exemption from liability from its own negligence.<sup>1</sup> This general rule applies to sleeping car companies, but it does not preclude them from providing by contract or by reasonable rules and regulations brought to the notice of the passenger for the disposition of property and baggage brought into the car. If the stipulations of the contract or the rules and regulations made known to the passenger require passengers to put their baggage or property in designated places and such places are provided, it is incumbent on the passengers to put their property in the places designated, and a contract exempting the company from liability unless the property is so disposed of by the passenger would, as we believe, be valid. It is held, however, that a sleeping car company can not exonerate itself from liability by a notice posted in the car unless such notice is brought to the passenger's knowledge,<sup>2</sup> but if the passenger has actual knowledge of such notice he will be bound by it.<sup>3</sup> A sleeping car company can not, however, by contract or by rules and regulations, require passengers to discharge duties devolved by law upon the company, nor to perform unreasonable acts.

<sup>1</sup> *The Brantford City*, 29 Fed. 373. *Davis v. Chicago, etc., R. Co.*, (Wis.) 67 N. W. R. 16; *Annas v. Milwaukee R. Co.*, 67 Wis. 46, s. c. 30 N. W. R. 282; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Railroad Co. v. Stevens*, 95 U. S. 655; *Hart v. Chicago, etc., R. Co.*, 69 Iowa 485, s. c. 29 N. W. R. 597; *Coppock v. Long Island R. Co.*, 34 N. Y. S. 1039; *Phoenix, etc., Co. v. Erie, etc., Co.*, 117 U. S. 312; *Inman v. South Carolina R. Co.*, 129 U. S. 128. In New York a contract exempting from liability for negligence of employes is held effective. *Nicholas v. New York, etc., Co.*, 89 N. Y. 370. The English rule is different from the American. *McCance v. London, etc., R. Co.*, 7 Hurl. & N. 477; *Hall v. Northeastern, etc., Co.*, L. R. 10

Q. B. 437; *Glenister v. Great Western, etc., R. Co.*, 29 L. T. N. S. 423; *Macawley v. Furness R. Co.*, L. R. 8 Q. B. 57; *Slim v. Great Northern, etc., Co.*, 14 C. B. 647; *Carr v. Lancashire, etc., R. Co.*, 7 Exch. 707; *York, etc., R. Co. v. Crisp*, 14 C. B. 527; *Taubman v. Pacific, etc., Co.*, 26 L. T. N. S. 704; *Austin v. Manchester, etc., R. Co.*, 10 C. B. 454.

<sup>2</sup> *Lewis v. New York, etc., Co.*, 143 Mass. 267, s. c. 58 Am. R. 135; *Woodruff, etc., Co. v. Diehl*, 84 Ind. 474, s. c. 43 Am. R. 102.

<sup>3</sup> *Watkins v. Rymill*, L. R. 10 Q. B. D. 178; *Burke v. Southeastern, etc., R. Co.*, L. R. 5 C. P. Div. 1; *Pullman, etc., Co. v. Smith*, 73 Ill. 360; *Blum v. Southern, etc., Co.*, 3 Cent. L. J. 591.

## CHAPTER LXIX.

### INJURIES TO PASSENGERS.

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| <p>§ 1628. Boarding and alighting from trains.</p> <p>1629. Injuries received on freight trains.</p> <p>1630. Injuries to passengers on platforms and steps.</p> <p>1631. Injuries to passengers riding in baggage car.</p> <p>1632. Injuries to passengers riding in other dangerous and improper places.</p> <p>1633. Injuries received by passengers occupying an improper position in car.</p> <p>1634. Injuries caused by derailment.</p> <p>1635. Collisions.</p> | <p>§ 1636. Injuries from obstructions.</p> <p>1637. Ejection of passengers.</p> <p>1638. Assault and injuries by employes.</p> <p>1639. Injuries caused by other passengers and third persons.</p> <p>1640. Injuries received in sleeping cars.</p> <p>1641. Injuries received at stations.</p> <p>1642. Contributory negligence.</p> <p>1643. Effect of direction by trainmen to occupy dangerous position.</p> <p>1644. Burden of proof.</p> <p>1645. Contracts limiting liability.</p> |
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§ 1628. Boarding and alighting from trains.—We have elsewhere considered the general duties and liabilities of railroad companies to passengers,<sup>1</sup> and we shall in this chapter consider the liabilities of such companies for injuries received by passengers under various particular circumstances. Railroad companies are bound, when they stop their trains at stations for the purpose of receiving and discharging passengers, to give them a reasonable opportunity to get on and off,<sup>2</sup>

<sup>1</sup> *Ante*, chapter LXVI.

<sup>2</sup> *Wabash, etc., R. Co. v. Rector*, 104 Ill. 296, s. c. 9 Am. & Eng. R. Cas. 264, 2 Am. Neg. Cas. 648; *Chicago, etc., R. Co. v. Byrum*, 153 Ill. 131, 2 Am. Neg. Cas. 719; *Chicago, etc., R. Co. v. Drake*, 33 Ill. App. 114, 2 Am. Neg. Cas. 509; *Carr. v. Eel River, etc., R. Co.*, 98 Cal.

366, 2 Am. Neg. Cas. 207; *Jeffersonville, etc., R. Co. v. Parmalee*, 51 Ind. 42; *Keller v. Sioux City, etc., R. Co.*, 27 Minn. 178; *Hickman v. Missouri Pac. R. Co.*, 91 Mo. 433; *Central R. Co. v. Whitehead*, 74 Ga. 441; *White Water Valley R. Co. v. Butler*, 112 Ind. 598. It has been held that the court will

and it has been held that the fact that the conductor is induced by the conduct and conversation of a person on the station platform to believe that he does not intend to take passage will not relieve the company from liability for injuries received by him without his fault, in consequence of the train being started without giving him a reasonable time to get on, if the conductor actually sees him attempting to get on when he gives the order to start, and that, even if the conductor does not see a passenger attempting to board the train, he is guilty of negligence for which the company is liable if he starts it without warning and without allowing a reasonable length of time for passengers to get on.<sup>1</sup> But a plaintiff can recover only according to the theory of his complaint, or, as it is sometimes said, *secundum allegata et probata*, and, where the complaint seeks to recover for negligence in failing to stop long enough to enable the plaintiff to alight, there can be no recovery on proof that the plaintiff's injuries were caused by reason of the company's failure to keep the station platform lighted.<sup>2</sup> It is

take judicial notice that three minutes is a reasonable time. Louisville, etc., R. Co. v. Costello, 9 Ind. App. 462, s. c. 3 Am. Neg. Cas. 44. As to the duty to assist passengers in getting on and off and the liability of the company to those who assist them where its employes fail to do so and it does not give such assistants a reasonable opportunity to get off, see Louisville, etc., R. Co. v. Crunk, 119 Ind. 542; Doss v. Missouri, etc., R. Co., 59 Mo. 38, s. c. 21 Am. R. 371; Lucas v. New Bedford, etc., R. Co., 6 Gray (Mass.) 64, s. c. 66 Am. Dec. 406; Stiles v. Atlanta, etc., R. Co., 65 Ga. 370; Griswold v. Chicago, etc., R. Co., 64 Wis. 652; Coleman v. Georgia, etc., R. Co., 84 Ga. 1; Little Rock, etc., R. Co. v. Lawton, 55 Ark. 428, 15 L. R. A. 434, and note.

<sup>1</sup>Swigert v. Hannibal, etc., R. Co., 75 Mo. 475, s. c. 9 Am. & Eng. R. Cas. 322; Raben v. Central, etc., R. Co., 73

Iowa 579; Texas, etc., R. Co. v. Miller, 79 Tex. 78, s. c. 11 L. R. A. 395, and note; Louisville, etc., R. Co. v. Wood, 113 Ind. 544; Chicago, etc., R. Co. v. Drake, 33 Ill. App. 114, 2 Am. Neg. Cas. 509. It is also held that due notice of the approach of the train to stations should be given in order that passengers may prepare to alight. Dawson v. Louisville, etc., R. Co., (Ky.) 11 Am. & Eng. R. Cas. 134; Louisville, etc., R. Co. v. Mask, 64 Miss. 738; New York, etc., R. Co. v. Coulbourn, 69 Md. 360, s. c. 1 L. R. A. 541; Patterson's Railway Acc. Law, 261. And reasonable notice of the starting of trains should likewise be given. Perry v. Central R. Co., 66 Ga. 746; Central R., etc., Co. v. Perry, 58 Ga. 461; Milliman v. New York, etc., R. Co., 66 N. Y. 642. But warning is not always necessary. Atlanta, etc., R. Co. v. Dickerson, 89 Ga. 455.

<sup>2</sup>Price v. St. Louis, etc., R. Co., 72

also the duty of railroad companies to provide and maintain a safe way of reaching and departing from their cars at passenger stations,<sup>1</sup> and, if the train stops short of the station or carries the passengers beyond it and the company obliges them to leave the cars at a distance from the platform, it must take proper precautions to protect them, especially where they have to cross other tracks, or it will be guilty of negligence.<sup>2</sup> After the conductor has waited a reasonable length of time at a regular station for passengers to get on and off the train he may then give the proper signal and start it, unless he sees some one in the act of getting on or off, or otherwise in a perilous

Mo. 414, s. c. 3 Am. & Eng. R. Cas. 365. See, also, *Waldhier v. Hannibal*, etc., R. Co., 71 Mo. 514; 1 *Elliott's Gen. Pr.*, § 87; *Cincinnati*, etc., R. Co. v. *McClain*, (Ind.) 44 N. E. R. 306; *Cleveland*, etc., R. Co. v. *Wyant*, 100 Ind. 160; *Birmingham R.*, etc., Co. v. *Clay*, (Ala.) 19 So. R. 309.

<sup>1</sup> *Missouri Pac. R. Co. v. Wortham*, 73 Tex. 25, s. c. 3 L. R. A. 368; *Reynolds v. Texas*, etc., R. Co., 37 La. Ann. 694; *Peniston v. Chicago*, etc., R. Co., 34 La. Ann. 777; *Kentucky*, etc., Co. v. *McKinney*, 9 Ind. App. 213; *Louisville*, etc., R. Co. v. *Holsapple*, 12 Ind. App. 301, 38 N. E. R. 1107; *Bethmann v. Old Colony R. Co.*, 155 Mass. 352; *Philadelphia*, etc., R. Co. v. *Anderson*, 72 Md. 519; *Cockle v. London*, etc., R. Co., 7 L. R. C. P. 321; *Nicholson v. Lancashire*, etc., R. Co., 3 H. & C. 534; *Gill v. Great Eastern R. Co.*, 26 L. T. N. S. 945; *Louisville*, etc., R. Co. v. *Lucas*, 119 Ind. 583; *Longmore v. Great Western R. Co.*, 19 C. B. (N. S.) 183; *Clussman v. Long Island R. Co.*, 73 N. Y. 606; *McKone v. Michigan*, etc., R. Co., 51 Mich. 601, 47 Am. R. 596; *McDonald v. Chicago*, etc., R. Co., 26 Iowa 124; *Stewart v. International*, etc., R. Co., 53 Tex. 289, 2 Am. & Eng. R. Cas. 497; *Forsyth v. Boston*, etc., R. Co.,

103 Mass. 510; *Buenemann v. St. Paul*, etc., R. Co., 32 Minn. 390, 18 Am. & Eng. R. Cas. 153; *Wharton on Negligence*, §§ 652, 654.

<sup>2</sup> *Brassell v. New York Cent.*, etc., R. Co., 84 N. Y. 241, s. c. 3 Am. & Eng. R. Cas. 380, and note; *Delaware*, etc., R. Co. v. *Trautwein*, 52 N. J. L. 169, s. c. 7 L. R. A. 435; *Gaynor v. Old Colony*, etc., R. Co., 100 Mass. 208, s. c. 97 Am. Dec. 96; *Mayo v. Boston*, etc., R. Co., 104 Mass. 137; *McGee v. Missouri*, etc., R. Co., 92 Mo. 208; *Cincinnati*, etc., R. Co. v. *Carper*, 112 Ind. 26; *Columbus*, etc., R. Co. v. *Farrell*, 31 Ind. 408; *Terre Haute*, etc., R. Co. v. *Buck*, 96 Ind. 346; *Pennsylvania R. Co. v. White*, 88 Pa. St. 327; *Brown v. Chicago*, etc., R. Co., 54 Wis. 342, 41 Am. R. 41; *Delamatyr v. Milwaukee*, etc., R. Co., 24 Wis. 578; *Terry v. Jewett*, 78 N. Y. 338; *Lewis v. President*, etc., 145 N. Y. 508; *Peniston v. Chicago*, etc., R. Co., 34 La. Ann. 777; *Philadelphia*, etc., R. Co. v. *Anderson*, 72 Md. 519, s. c. 20 Atl. R. 2, 3 *Lewis' Am. R. & Corp. R.* 217; *Nicholson v. Lancashire*, etc., R. Co., 3 H. & C. 534; *Foy v. London*, etc., R. Co., 18 C. B. N. S. 225; *Robson v. Northeastern R. Co.*, L. R. 10 Q. B. 271.



position,<sup>1</sup> but it has been held that in the case of a street railway, where there is no regular stopping place, he must not only stop a reasonable time but should also see that no passenger is in the act of alighting before giving the signal to start.<sup>2</sup> Although the railroad company may be guilty of negligence a passenger can not recover if he is guilty of contributory negligence proximately causing his own injury. It is the duty of a passenger to exercise reasonable and ordinary care for his own safety in boarding or alighting from a train. As a general rule it is negligence *per se* to get on or off a rapidly moving train.<sup>3</sup> But if the train is moving very slowly it has been held

<sup>1</sup> Chicago, etc., R. Co. v. Scates, 90 Ill. 586, 2 Am. Neg. Cas. 623; Spanagle v. Chicago, etc., R. Co., 31 Ill. App. 460, 2 Am. Neg. Cas. 506; Missouri Pac. R. Co. v. Foreman, 73 Tex. 311. Or unless he has reason to believe that a passenger is in the act of alighting. Strauss v. Kansas City, etc., R. Co., 86 Mo. 421. And if after ample time to board the train or alight from it and after warning being given, a passenger attempts to board the train or alight from it when moving he is guilty of contributory negligence. McLaren v. Alabama, etc., R. Co., 100 Ala. 506, 2 Am. Neg. Cas. 107. And warning is not always necessary. Atlanta, etc., R. Co. v. Dickerson, 89 Ga. 455.

<sup>2</sup> Highland Avenue, etc., R. Co. v. Burt, 92 Ala. 291, s. c. 2 Am. Neg. Cas. 73; Anderson v. Citizens' St. R. Co., 12 Ind. App. 194, 38 N. E. R. 1109. See, also, Washington, etc., R. Co. v. Harmon's Admr., 147 U. S. 571, s. c. 13 Sup. Ct. R. 557; Dudley v. Front Street, etc., R. Co., 73 Fed. R. 128.

<sup>3</sup> O'Toole v. Pittsburgh, etc., R. Co., 158 Pa. St. 99, s. c. 27 Atl. R. 737; New York, etc., R. Co. v. Enches, 127 Pa. St. 316, s. c. 17 Atl. R. 991; Toledo, etc., R. Co. v. Wingate, 143 Ind. 125, 42 N. E. R. 447, 37 N. E. R. 274; Jeffer-

sonville R. Co. v. Hendricks, 26 Ind. 228; Harvey v. Eastern, etc., R. Co., 116 Mass. 269; Solomon v. Manhattan R. Co., 103 N. Y. 437; Phillips v. Rensselaer, etc., R. Co., 49 N. Y. 177; Gavett v. Manchester, etc., R. Co., 16 Gray, (Mass.) 501, s. c. 77 Am. Dec. 422; Commonwealth v. Boston, etc., R. Co., 129 Mass. 500; Jewell v. Chicago, etc., R. Co., 54 Wis. 610; Richmond, etc., R. Co. v. Pickleseimer, 85 Va. 798, s. c. 10 S. E. R. 44; Hunter v. Cooperstown, etc., R. Co., 112 N. Y. 371, 2 L. R. A. 832; Secor v. Toledo, etc., R. Co., 10 Fed. R. 15; Hickey v. Boston, etc., R. Co., 14 Allen 429; Missouri Pac. R. Co. v. Texas, etc., R. Co., 36 Fed. R. 879; Paterson v. Central, etc., R. Co., 85 Ga. 653; Alabama, etc., R. Co. v. Hawk, 72 Ala. 112; Worthington v. Central, etc., R. Co., 64 Vt. 107, 15 L. R. A. 326, and note; Knight v. Pontchartrain R. Co., 23 La. Ann. 462; Walker v. Vicksburg, etc., R. Co., 41 La. Ann. 795, s. c. 6 So. R. 916; Jacob v. Flint, etc., R. Co., (Mich.) 63 N. W. R. 502; McDonald v. Montgomery, etc., R. Co., (Ala.) 20 So. R. 317; Illinois, etc., R. Co. v. Able, 59 Ill. 131, 2 Am. Neg. Cas. 591; Ohio, etc., R. Co. v. Stratton, 78 Ill. 88; Masterson v. Macon City, etc., St. R. Co., 88 Ga. 436; Barnett v. East

by some courts to be a question of fact for the jury,<sup>1</sup> and it certainly becomes a question of fact where a passenger is put to his election to get off a slowly moving train or probably receive an injury if he remains there, by the wrongful act of the company, or obeys the directions of the conductor under such circumstances that a reasonably prudent man might do so in the exercise of ordinary care.<sup>2</sup> So, he may be misled and jus-

Tennessee, etc., R. Co., 87 Ga. 766. Butsee Beachon Contrib. Neg., §§ 146, 147; Baltimore, etc., R. Co. v. Kane, 69 Md. 11, s. c. 13 Atl. R. 387; Johnson v. West Chester, etc., R. Co., 70 Pa. St. 357; Jamison v. San Jose, etc., R. Co., 55 Cal. 593; Raben v. Central Iowa R. Co., 74 Iowa 732, s. c. 34 N. W. R. 621. It is held negligence *per se* to attempt to board a moving elevated train after the gate is closed, where the train is accustomed to stop and start quickly. Card v. Manhattan R. Co., 103 N. Y. 670. It is negligence to board a moving freight train not intended for the carriage of passengers, even though so directed by the ticket agent. Chicago, etc., R. Co. v. Koehler, 47 Ill. App. 147, 2 Am. Neg. Cas. 523. Or to get on a moving train at a place not intended for a stopping place. Denver, etc., R. Co. v. Pickard, 8 Colo. 163.

<sup>1</sup> Filer v. New York, etc., R. Co., 49 N. Y. 47; Lewis v. President, etc., 145 N. Y. 508, 1 Am. Neg. Cas. 963; Swigert v. Hannibal, etc., R. Co., 75 Mo. 475, s. c. 9 Am. & Eng. R. Cas. 322; Doss v. Missouri, etc., R. Co., 59 Mo. 27, s. c. 21 Am. R. 371; Central R., etc., Co. v. Miles, 88 Ala. 256, s. c. 6 So. R. 696; Louisville, etc., R. Co. v. Stacker, 86 Tenn. 343, s. c. 6 S. W. R. 737; New York, etc., R. Co. v. Coulbourn, 69 Md. 360, s. c. 1 L. R. A. 541; Strand v. Chicago, etc., R. Co., 64 Mich. 216, s. c. 31 N. W. R. 184; Carr v. Eel River, etc., R. Co., 98 Cal. 366, 2 Am.

Neg. Cas. 207; Fulks v. St. Louis, etc., R. Co., 111 Mo. 335; Lent v. New York, etc., R. Co., 120 N. Y. 467; Johnson v. West Chester, etc., R. Co., 70 Pa. St. 357; Montgomery, etc., R. Co. v. Stewart, 91 Ala. 421; Baltimore, etc., R. Co. v. Kane, 69 Md. 11; Kansas, etc., R. Co. v. Dorough, 72 Tex. 108. In Montgomery, etc., R. Co. v. Stewart, 91 Ala. 421, it was held not contributory negligence when a passenger boarded a train which should have come to a full stop but only slacked its speed, the conductor calling out "all aboard."

<sup>2</sup> Georgia, etc., R. Co. v. McCurdy, 45 Ga. 288; Filer v. New York, etc., R. Co., 49 N. Y. 47; Loyd v. Hannibal, etc., R. Co., 53 Mo. 509; Price v. St. Louis, etc., R. Co., 72 Mo. 414; Bartholomew v. New York, etc., R. Co., 102 N. Y. 716; Cincinnati, etc., R. Co. v. Carper, 112 Ind. 26, 39; St. Louis, etc., R. Co. v. Person, 49 Ark. 182, s. c. 4 S. W. R. 755; Pennsylvania R. Co. v. Lyons, 129 Pa. St. 113, 25 W. N. C. 6; Baltimore, etc., R. Co. v. Leapley, 65 Md. 571; South Covington, etc., R. Co. v. Ware, 84 Ky. 267, 1 S. W. R. 493; Delaware, etc., Canal Co. v. Webster, (Pa. St.) 6 Atl. R. 841; Lambeth v. North Carolina R. Co., 66 N. Car. 494; Hinshaw v. Raleigh, etc., R. Co., (N. Car.) 24 S. E. R. 426; Bodie v. Carolina Midland R. Co., (S. Car.) 24 S. E. R. 180; Thomas v. Charlotte, etc., R. Co., 38 S. Car. 485, 17 S. E. R. 226; McGee v. Missouri, etc., R.

tified in alighting from the train at some place other than the regular station or platform by the invitation of the company.<sup>1</sup> The mere announcement of the station is not an invitation to alight while the train is moving,<sup>2</sup> but if he is told that the next stop will be at his station, or if the train stops shortly after the announcement of the station he may assume, in the absence of anything to the contrary, that it is the proper place to alight, and will not necessarily be guilty of contributory negligence in so doing.<sup>3</sup> But if he knows that the train is not

Co., 92 Mo. 208, 4 S. W. R. 739; *Iron R. Co. v. Mowery*, 36 Ohio St. 418, s. c. 3 Am. & Eng. R. Cas. 361, and note. Where a brakeman stationed where he could see up and down the track suddenly and excitedly called "Jump! Jump for your lives!" it was held that a passenger was not negligent in so doing although there was no real danger. *McPeak v. Missouri Pac. R. Co.*, 128 Mo. 617, 30 S. W. R. 170; *Ephland v. Missouri Pac. R. Co.*, 57 Mo. App. 147.

<sup>1</sup>*Cockle v. London, etc., R. Co.*, L. R. 7 C. P. 321, 326; *Whittaker v. Manchester, etc., R. Co.*, L. R. 5 C. P. 464, note; *Praeger v. Bristol, etc., R. Co.*, 24 L. T. R. N. S. 105; *Gadsden, etc., R. Co. v. Causler*, 97 Ala. 235, s. c. 2 Am. Neg. Cas. 85; *Illinois Cent. R. Co. v. Able*, 59 Ill. 131; *Cartwright v. Chicago, etc., R. Co.*, 52 Mich. 606; *Curtis v. D., etc., R. Co.*, 27 Wis. 158; *Keating v. New York, etc., R. Co.*, 49 N. Y. 673; *Mitchell v. Western, etc., R. Co.*, 30 Ga. 22; *Louisville, etc., R. Co. v. Holsapple*, 12 Ind. App. 301, s. c. 38 N. E. R. 1107; *Columbus, etc., R. Co. v. Farrell*, 31 Ind. 408; *Bucher v. New York Cent. R. Co.*, 98 N. Y. 128.

<sup>2</sup>*Adams v. Louisville, etc., R. Co.*, 82 Ky. 603; *Railroad Co. v. Aspell*, 23 Pa. St. 147; *Jeffersonville, etc., R. Co. v. Hendricks*, 26 Ind. 228;

*Frost v. Grand Trunk R. Co.*, 10 Allen (Mass.) 387; *England v. Boston, etc., R. Co.*, 153 Mass. 490; *Lewis v. London, etc., R. Co.*, L. R. 9 Q. B. 66; *Bridges v. North London, etc., R. Co.*, L. R. 6 Q. B. 377.

<sup>3</sup>*Pennsylvania Co. v. Hoagland*, 78 Ind. 203, s. c. 3 Am. & Eng. R. Cas. 436; *Columbia, etc., R. Co. v. Farrell*, 31 Ind. 408; *Terre Haute, etc., R. Co. v. Buck*, 96 Ind. 346; *Central R. Co. v. Van Horn*, 38 N. J. L. 133; *Central R. Co. v. Thompson*, 76 Ga. 770; *Milliman v. New York, etc., R. Co.*, 66 N. Y. 642; *Hooks v. Alabama, etc., R. Co.*, (Miss.) 18 So. R. 925; *Southern, etc., R. Co. v. Pavey*, 48 Kan. 452, 29 Pac. R. 593; *McNulta v. Ensich*, 31 Ill. App. 100, s. c. 134 Ill. 46; *Chicago, etc., R. Co. v. Arnol*, 144 Ill. 261; *Philadelphia, etc., R. Co. v. Anderson*, 72 Md. 519; *Miller v. East Tennessee, etc., R. Co.*, 93 Ga. 630. But where the train stopped at a crossing, as required by law, near the station, after it had been announced, and a passenger attempted to alight and was injured in so doing it was held that the company was not liable. *Mitchell v. Chicago, etc., R. Co.*, 51 Mich. 236, s. c. 47 Am. R. 566. See, also, *Sevier v. Vicksburg, etc., R. Co.*, 61 Miss. 8, s. c. 48 Am. R. 74; *Minock v. Detroit, etc., R. Co.*, 97 Mich. 425, s. c. 56 N. W. R. 780.

at the station and that it is a dangerous and improper place to get off he is not, ordinarily at least, justified in so doing,<sup>1</sup> and in crossing other tracks or the like, even at a regular station, he can not do so blindly without exercising any care,<sup>2</sup> although he may assume, to a certain extent, that the company has performed its duty to provide a safe passage to and from the train and will not expose him to unnecessary danger.<sup>3</sup> The fact

<sup>1</sup> Ohio, etc., R. Co. v. Stratton, 78 Ill. 88; Illinois, etc., R. Co. v. Green, 81 Ill. 19, s. c. 25 Am. R. 255; England v. Boston, etc., R. Co., 153 Mass. 490, s. c. 27 N. E. R. 1; Eckerd v. Chicago, etc., R. Co., 70 Iowa 353; New York, etc., R. Co. v. Doane, 115 Ind. 435; Chicago, etc., R. Co. v. Hague, (Neb.) 66 N. W. R. 1000; Terre Haute, etc., R. Co. v. Buck, 96 Ind. 346, s. c. 49 Am. R. 168; Dewald v. Kansas City, etc., R. Co., 44 Kan. 586; East Tennessee, etc., R. Co. v. Holmes, 97 Ala. 332, s. c. 12 So. R. 286; Louisville, etc., Co. v. Ricketts, 96 Ky. 44, 27 S. W. R. 860 (getting off on wrong side); Sturgis v. Detroit, etc., R. Co., 72 Mich. 619, s. c. 40 N. W. R. 914; Morgan v. Camden, etc., R. Co., (Pa. St.) 16 Atl. R. 353, (getting off on wrong side). See Blodgett v. Bartlett, 50 Ga. 353, 2 Am. Neg. Cas. 350; Hemmingway v. Chicago, etc., R. Co., 67 Wis. 668; also, Cincinnati, etc., R. Co. v. Peters, 80 Ind. 168; Frost v. Grand Trunk, etc., R. Co., 10 Allen (Mass.) 387, s. c. 87 Am. Dec. 668. Nor in getting on at an unusual and dangerous place. Haase v. Oregon R. Co., 19 Ore. 354, s. c. 24 Pac. R. 238; Comly v. Pennsylvania R. Co., (Pa. St.) 12 Atl. R. 496.

<sup>2</sup> Weeks v. New Orleans, etc., R. Co., 40 La. Ann. 800, s. c. 5 So. R. 72; Morrison v. Erie R. Co., 56 N. Y. 302; Bancroft v. Boston, etc., R. Co., 97 Mass. 275; Mayo v. Boston, etc., R. Co., 104 Mass. 137; Forsyth v. Boston, etc., R. Co., 103 Mass. 510; Com-

monwealth v. Boston, etc., R. Co., 129 Mass. 500; Railway Co. v. Cox, 60 Ark. 106, s. c. 20 S. W. R. 38; Illinois Cent. R. Co. v. Davidson, 64 Fed. R. 301; East Tennessee, etc., R. Co. v. Kornegay, 92 Ala. 228, s. c. 9 So. R. 557; Baltimore, etc., R. Co. v. State, 63 Md. 135; Pennsylvania R. Co. v. Bell, (Pa. St.) 15 Atl. R. 561; De Kay v. Chicago, etc., R. Co., 41 Minn. 178, s. c. 43 N. W. R. 182; MacLeod v. Graven, 73 Fed. R. 627; Bradley v. Grand Trunk R. Co., (Mich.) 65 N. W. R. 102.

<sup>3</sup> Brassell v. New York Cent. R. Co., 84 N. Y. 241, s. c. 3 Am. & Eng. R. Cas. 380; Rogers v. Rhymney R. Co., 26 L. T. R. N. S. 879; Warren v. Fitchburg R. Co., 8 Allen (Mass.) 227; Pennsylvania R. Co. v. White, 88 Pa. St. 327; Baltimore, etc., R. Co. v. State, 60 Md. 449, s. c. 12 Am. & Eng. R. Cas. 149; Weeks v. New Orleans, etc., R. Co., 40 La. Ann. 800, s. c. 5 So. R. 72; Klein v. Jewett, 26 N. J. Eq. 474; Philadelphia, etc., R. Co. v. Anderson, 72 Md. 519, 3 Am. Neg. Cas. 706; Cartwright v. Chicago, etc., R. Co., 52 Mich. 606, s. c. 16 Am. & Eng. R. Cas. 321; Atchison, etc., R. Co. v. Shean, 18 Colo. 368, s. c. 33 Pac. R. 108, 8 Lewis' Am. R. & Corp. R. 316, and note. See, also, Richmond, etc., R. Co. v. Powers, 149 U. S. 43, s. c. 13 Sup. Ct. R. 748; Kohler v. Pennsylvania R. Co., 135 Pa. St. 346, s. c. 19 Atl. R. 1049; Franklin v. Southern California, etc., R. Co., 85

that the conductor tells a passenger who desires to get off at a crossing where the train is accustomed to stop, but which is not a station or regular place for taking on or letting off passengers, that he can go upon the platform when the train begins to slow up and get off when it stops will not justify him in standing upon the lowest step of the car while the train is moving at from twelve to fourteen miles an hour, and even if he is directed by the conductor to stand upon the step and be ready to get off, this will not relieve him from contributory negligence in taking a position known to him to be one of great danger.<sup>1</sup>

§ 1629. **Injuries received on freight trains.**—In a general sense it may be said that where a railroad company carries passengers on freight or mixed trains it must exercise the same high degree of care for the safety of its passengers as in other

Cal. 63, s. c. 24 Pac. R. 723; *Chicago, etc., R. Co. v. Lowell*, 151 U. S. 209, s. c. 14 Sup. Ct. R. 281.

<sup>1</sup> *Cincinnati, etc., R. Co. v. McClain*, (Ind.) 44 N. E. R. 306; *Reibel v. Cincinnati, etc., R. Co.*, 114 Ind. 476, s. c. 17 N. E. R. 107; *Cincinnati, etc., R. Co. v. Carper*, 112 Ind. 26, s. c. 13 N. E. R. 122, 123. See, also, *Hunter v. Cooperstown, etc., R. Co.*, 126 N. Y. 18; *Chicago, etc., R. Co. v. Hazzard*, 26 Ill. 373; *Aufdenberg v. St. Louis, etc., R. Co.*, (Mo.) 34 S. W. R. 485; *Vimont v. Chicago, etc., R. Co.*, 71 Iowa 58; *Bardwell v. Mobile, etc., R. Co.*, 63 Miss. 574. But see *Galloway v. Chicago, etc., R. Co.*, 87 Iowa 458, s. c. 54 N. W. R. 447; *post*, § 1643. In the first case just cited the complaint alleged that plaintiff desiring to get off at a crossing where the train was accustomed to stop, was informed by the conductor that he could do so, and was directed to go out on the platform when the train reached a certain point, ready to get off as soon as the train stopped at the crossing, as it

stopped but a moment; that he went on the platform as directed, and stood on the lower step of the car; that the train slowed down, but suddenly started with a jerk, throwing plaintiff under the car, by which he was injured; that the place at which he was directed to get off was not a safe and proper place, and that the injury occurred by reason of the negligence of the defendant and without any fault on his part. The jury returned answers to interrogatories finding the facts as alleged, except that the accident occurred at a switch about 1,600 feet from the crossing, where the engineer slowed down to pass the switches; that the stopping place was about 250 feet from the crossing; and that plaintiff's position on the lower step was dangerous, and was known by him to be dangerous. It was held that the plaintiff was not shown to be free from contributory negligence and that the special findings did not support a verdict for plaintiff.

cases.<sup>1</sup> But we do not mean that its duties and the precautions it must take are absolutely the same with respect to the operation of such trains as with respect to regular passenger trains. As to its roadbed, bridges and the like, it would seem that the duty is absolutely the same,<sup>2</sup> but it is obvious that the risk is greater in riding upon freight trains, that the same appliances can not be used and that the same speed and comparative freedom from sudden jerks and the like can not be attained. The duty of the company is therefore modified by the necessary difference between freight and passenger trains and the manner in which they must be operated, and while the general rule that the highest practicable degree of care must be exercised holds good, the nature of the train and the necessary difference in its mode of operation must be considered, and the company is bound to exercise only the highest degree of care that is usually and practically exercised and consistent with the operation of trains of that nature.<sup>3</sup> Thus, it is not bound to equip every car with an air brake nor to run a bell rope through the cars to the engine.<sup>4</sup> Nor is the company necessarily negligent,

<sup>1</sup> Delaware, etc., R. Co. v. Ashley, 67 Fed. R. 209; *Secord v. St. Paul, etc., R. Co.*, 18 Fed. R. 221; *Indianapolis, etc., R. Co. v. Beaver*, 41 Ind. 493; *Ohio, etc., R. Co. v. Dickerson*, 59 Ind. 317; *Illinois Cent. R. Co. v. Axley*, 47 Ill. App. 307; *Mexican Cent. R. Co. v. Lauricella*, (Tex. Civ. App.) 26 S. W. R. 301; *Dunn v. Grand Trunk R. Co.*, 58 Me. 187, s. c. 4 Am. R. 267; *Edgerton v. New York, etc., R. Co.*, 39 N. Y. 227; *St. Joseph, etc., R. Co. v. Wheeler*, 35 Kan. 185; *International, etc., R. Co. v. Irvine*, 64 Tex. 529; *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401; *Whitehead v. St. Louis, etc., R. Co.*, 99 Mo. 263, s. c. 39 Am. & Eng. R. Cas. 410.

<sup>2</sup> *Ohio Valley R. Co. v. Watson*, 93 Ky. 654, s. c. 21 S. W. R. 244, 19 L. R. A. 310; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291. Compare *Arkansas, etc., R. Co. v. Canman*, 52 Ark.

517, s. c. 13 S. W. R. 280. See, also, as to the duty to furnish a caboose and the liability of the company where a common box-car with temporary seats was substituted while the caboose was in the repair shop. *Missouri Pac. R. Co. v. Holcomb*, 44 Kan. 332, s. c. 44 Am. & Eng. R. Cas. 303, and compare *Pittsburgh, etc., R. Co. v. Williams*, 74 Ind. 462.

<sup>3</sup> *Woolery v. Louisville, etc., R. Co.*, 107 Ind. 381; *Crine v. East Tenn., etc., R. Co.*, 84 Ga. 651, s. c. 11 S. E. R. 555; *Galena, etc., R. Co. v. Fay*, 16 Ill. 558, s. c. 63 Am. Dec. 323; *Chicago, etc., R. Co. v. Hazzard*, 26 Ill. 373; *Wallace v. Western, etc., R. Co.*, 101 N. Car. 454, s. c. 37 Am. & Eng. R. Cas. 159; *Chicago, etc., R. Co. v. Arnol*, 144 Ill. 261, s. c. 33 N. E. R. 204, 19 L. R. A. 313, 315, 316.

<sup>4</sup> *Oviatt v. Dakota Cent. R. Co.*, 43 Minn. 300, s. c. 45 N. W. R. 436; *Ar-*

because in starting or in taking up and letting out slack there is more or less of a jerk or sudden motion of the cars.<sup>1</sup> Nor is it obliged to have a brakeman on every car.<sup>2</sup> So, a passenger riding on a freight train or a mixed train must be deemed to assume all the inconveniences and risks usually and reasonably incident to transportation or travel upon such trains and is not entitled to insist upon having the same care and attention that he might justly demand upon a regular passenger train.<sup>3</sup> The nature of the train may also have an important bearing upon the question of contributory negligence. As the passenger upon a freight train assumes the risks incident to that means of conveyance and must take notice thereof, he must exercise ordinary and reasonable care to guard against injury from such risks and must not voluntarily take a position where he is likely to be injured by a sudden jerk of the car resulting from the taking up of slack in the ordinary way or the like.<sup>4</sup> But if the train is suddenly started immediately after it

kansas, etc., *R. v. Canman*, 52 Ark. 517, s. c. 13 S. W. R. 280.

<sup>1</sup> *Rockford, etc., R. Co. v. Coultas*, 67 Ill. 398; *Crine v. East Tenn., etc., R. Co.*, 84 Ga. 651, s. c. 11 S. E. R. 555.

<sup>2</sup> See *Delaware, etc., R. Co. v. Ashley*, 67 Fed. R. 209; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291.

<sup>3</sup> *Louisville, etc., R. Co. v. Bisch*, 120 Ind. 549, s. c. 22 N. E. R. 662; *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401, s. c. 28 N. E. R. 860; *Murch v. Concord, etc., R. Co.*, 29 N. H. 9, s. c. 61 Am. Dec. 631; *Crine v. East Tenn., etc., R. Co.*, 84 Ga. 651, s. c. 11 S. E. R. 555; *Fisher v. Southern Pac. R. Co.*, 89 Cal. 399, s. c. 26 Pac. R. 894; *Browne v. Raleigh, etc., R. Co.*, 108 N. Car. 34, s. c. 12 S. E. R. 958; *Powers v. Boston, etc., R. Co.*, 153 Mass. 188, s. c. 26 N. E. R. 446; *Harris v. Hannibal, etc., R. Co.*, 89 Mo. 233; *McKinney v. Neil*, 1 McLean 540; *Hazard v. Chicago, etc., R. Co.*, 1 Biss. 503; *ante*, § 1582. So where he rides

in a stock or box-car. *Gardner v. New Haven, etc., R. Co.*, 51 Conn. 143, s. c. 50 Am. R. 12; *Jenkins v. Chicago, etc., R. Co.*, 41 Wis. 112; *Omaha, etc., R. Co. v. Crow*, (Neb.) 66 N. W. R. 21. But see *Florida, etc., Co. v. Webster*, 25 Fla. 394. Or a construction train. *Rosenbaum v. St. Paul, etc., R. Co.*, 38 Minn. 173, s. c. 36 N. W. R. 447.

<sup>4</sup> *Louisville, etc., R. Co. v. Bisch*, 120 Ind. 549, s. c. 22 N. E. R. 662; *Wallace v. Western, etc., R. Co.*, 98 N. Car. 494, s. c. 2 Am. St. R. 346, (passengers standing in caboose and thrown down and injured by sudden jerk of the train); *Harris v. Hannibal, etc., R. Co.*, 89 Mo. 233, s. c. 58 Am. R. 111; *Norfolk, etc., R. Co. v. Ferguson*, 79 Va. 241; *Smith v. Richmond, etc., R. Co.*, 99 N. Car. 241, (passenger sitting on arm of seat); *Reber v. Bond*, 38 Fed. R. 822. But compare *Lusby v. Atchison, etc., R. Co.*, 41 Fed. R. 181; *Chicago, etc., R. Co. v. Carpenter*, 56 Fed. R. 451.

has stopped for passengers to alight and a passenger who has arisen from his seat for the purpose of alighting is thrown down and injured by the violent jerk he is entitled to recover the same as if the train were a regular passenger train.<sup>1</sup> Railroad companies which run both passenger and freight trains reasonably sufficient for the accommodation of both kinds of traffic may lawfully refuse to carry passengers on freight trains or prescribe reasonable conditions on which they may ride on such trains.<sup>2</sup> It has been held that one who offers himself as a passenger upon a freight train, having no knowledge of the rules of the company prohibiting the transportation of passengers upon such trains, is, when accepted as such by the conductor, entitled to be treated and protected as a passenger, even though he pays no fare.<sup>3</sup> But he has no right to rely upon the invitation of the brakeman or other subordinate employe when a conductor is in charge,<sup>4</sup> nor upon that of the conductor himself when he knows of the rule forbidding passengers to ride on freight trains.<sup>5</sup> Indeed, we are inclined to

<sup>1</sup> *Chicago, etc., R. Co. v. Arnol*, 144 Ill. 261, s. c. 33 N. E. R. 204, 19 L. R. A. 313. See, also, *Lusby v. Atchison, etc., R. Co.*, 41 Fed. R. 181.

<sup>2</sup> *Thomas v. Chicago, etc., R. Co.*, 72 Mich. 355, s. c. 37 Am. & Eng. R. Cas. 108; *Burlington, etc., R. Co. v. Rose*, 11 Neb. 177, s. c. 8 N. W. R. 433; *Southern Kan. R. Co. v. Hinsdale*, 38 Kan. 507, s. c. 34 Am. & Eng. R. Co. 256; *Hobbs v. Texas, etc., R. Co.*, 49 Ark. 357; *Arnold v. Illinois, etc., R. Co.*, 83 Ill. 273; *Elkins v. Boston, etc., R. Co.*, 23 N. H. 275; *Pfister v. Central Pac. R. Co.*, 70 Cal. 169, s. c. 27 Am. & Eng. R. Cas. 246; *Dunn v. Grand Trunk R. Co.*, 58 Mo. 187, s. c. 4 Am. R. 267; *Falkner v. Ohio, etc., R. Co.*, 55 Ind. 369. So, they may run a "pay train" and exclude passengers therefrom. *Southwestern, etc., R. Co. v. Singleton*, 66 Ga. 252.

<sup>3</sup> See *Whitehead v. St. Louis, etc., R. Co.*, 99 Mo. 263, s. c. 39 Am. &

Eng. R. Cas. 410, 11 S. W. R. 751; *McGee v. Missouri, etc., R. Co.*, 92 Mo. 208, s. c. 4 S. W. R. 739; *Lucas v. Milwaukee, etc., R. Co.*, 33 Wis. 41; *Keith v. Pinkham*, 43 Me. 501, s. c. 69 Am. Dec. 80; *Dunn v. Grand Trunk R. Co.*, 58 Me. 187, s. c. 4 Am. R. 267; *Everett v. Oregon, etc., R. Co.*, 9 Utah 340, s. c. 34 Pac. R. 289; *Jacobus v. St. Paul, etc., R. Co.*, 20 Minn. 125; *Gradin v. St. Paul, etc., R. Co.*, 30 Minn. 217.

<sup>4</sup> *Candiff v. Louisville, etc., R. Co.*, 42 La. Ann. 477; *Reary v. Louisville, etc., R. Co.*, 40 La. Ann. 32; *McNamara v. Great Northern R. Co.*, (Minn.) 63 N. W. R. 726; *Chicago, etc., R. Co. v. Field*, 7 Ind. App. 172, s. c. 34 N. E. R. 406; *Woolsey v. Chicago, etc., R. Co.*, 39 Neb. 798, s. c. 58 N. W. R. 444.

<sup>5</sup> *St. Louis, etc., R. Co. v. White*, (Tex. Civ. App.) 34 S. W. R. 1042; *Gulf, etc., R. Co. v. Campbell*, 76 Tex. 174; *Toledo, etc., R. Co. v. Brooks*, 81



think that the better rule is that he must take notice that passengers are not usually carried upon freight trains where no provision is made for them and that the conductor has no implied authority to invite persons to ride on such a train or to receive them as passengers thereon.<sup>1</sup>

§ 1630. *Injuries to passengers riding on platforms and steps.*—In the first case cited in support of the last proposition stated in the preceding section it is held that standing on the lower step of a rapidly moving car is negligence *per se*. We think there can be no doubt that this is the law,<sup>2</sup> however it may be as to standing on the platform when the car is crowded, or as to standing on the steps of a street car. It is also negligence, under ordinary circumstances, to stand upon the platform of a rapidly moving commercial railroad car.<sup>3</sup> But there may

Ill. 245; Louisville, etc., R. Co. v. Hailey, 94 Tenn. 383, s. c. 29 S. W. R. 367; McVeety v. St. Paul, etc., R. Co., 45 Minn. 268, s. c. 47 N. W. R. 809.

<sup>1</sup> See *ante*, §§ 1578, 1580; Powers v. Boston, etc., R. Co., 153 Mass. 188, s. c. 26 N. E. R. 446; Eaton v. Delaware, etc., R. Co., 57 N. Y. 382; San Antonio, etc., R. Co. v. Lynch, 8 Tex. Civ. App. 513, 28 S. W. R. 252; Texas, etc., R. Co. v. Black, 87 Tex. 160, s. c. 27 S. W. R. 118. See, also, Houston, etc., R. Co. v. Bolling, 59 Ark. 395, s. c. 43 Am. St. R. 38; Murch v. Concord, etc., R. Co., 29 N. H. 9, s. c. 61 Am. Dec. 631; Hoar v. Maine Cent. R. Co., 70 Me. 65; Atchison, etc., R. Co. v. Headland, 18 Colo. 477, s. c. 33 Pac. 185, 8 Lewis' Am. R. & Corp. R. 105; Kansas City, etc., R. Co. v. Berry, 53 Kan. 112, s. c. 36 Pac. R. 53; Powell v. East Tenn., etc., R. Co., (Miss.) 8 So. R. 738.

<sup>2</sup> "The steps must be regarded as a more dangerous place for a passenger to occupy while the car is in motion than the platform." Fisher v. West Virginia, etc., R. Co., 39 W. Va. 366, 19

S. E. R. 578. See, also, Scheiber v. Chicago, etc., R. Co., (Minn.) 63 N. W. R. 1034; Paterson v. Central R., etc., Co., 85 Ga. 653; Clark v. Eighth Ave. R. Co., 36 N. Y. 135; Cleveland, etc., R. Co. v. Moneyhun, (Ind.) 44 N. E. R. 1106; Hoehn v. Chicago, etc., R. Co., 152 Ill. 223, s. c. 38 N. E. R. 549; Cincinnati, etc., R. Co. v. McClain, (Ind.) 44 N. E. R. 306; Ashbrook v. Frederick Ave. R. Co., 18 Mo. App. 290; Francisco v. Troy, etc., R. Co., 78 Hun 13, s. c. 29 N. Y. Supp. 247; Booth on Street Railways, § 341.

<sup>3</sup> Alabama, etc., R. Co. v. Hawk, 72 Ala. 112; Paterson v. Central, etc., R. Co. 85 Ga. 653; Blodgett v. Bartlett, 50 Ga. 353; Bemiss v. New Orleans, etc., R. Co., 47 La. 1671, 18 So. R. 711; Quinn v. Illinois Cent. R. Co., 51 Ill. 495; Smotherman v. St. Louis, etc., R. Co., 29 Mo. App. 265; Rockford, etc., Co. v. Coultas, 67 Ill. 398; Illinois Cent. R. Co. v. Green, 81 Ill. 19; Malcom v. Richmond, etc., R. Co., 106 N. Car. 63, s. c. 11 S. E. R. 187; President, etc., v. Cason, 72 Md. 377, s. c. 20 Atl. R. 113; Hickey v. Boston,

be exceptional cases in which this is not true, and two or three of the courts have held that standing upon the platform is not contributory negligence where the car is so crowded that the passenger is unable to get a seat therein, although there is room for him to stand inside the car.<sup>1</sup> This seems to us, however, to be contrary both to principle and to the weight of authority.<sup>2</sup> The failure to furnish him with a seat may be of

etc., R. Co., 14 Allen (Mass.) 429; Memphis, etc., R. Co. v. Salinger, 46 Ark. 528; Secor v. Toledo, etc., R. Co., 10 Fed. R. 15. "The danger of standing on the narrow platform of a passenger car, while the car is moving with the usual speed of railroad trains, is most conspicuous. \* \* \* The knowingly incurring such an imminent, visible peril; the choosing to ride in such a conspicuously dangerous place, must be held by all reasonable people to be reckless in a high degree. The danger, the chance of injury, is visibly imminent and great. No man of reason can fail to apprehend it. No prudent man would fail to avoid it. There seems to us no room for debate or question upon this proposition." Goodwin v. Boston, etc., R. Co., 84 Me. 203, s. c. 24 Atl. R. 816.

<sup>1</sup> Willis v. Long Island R. Co., 34 N. Y. 670; Werle v. Long Island R. Co., 98 N. Y. 650; Lynn v. Southern Pac. Co., 103 Cal. 7, s. c. 36 Pac. R. 1018. 24 L. R. A. 710. See, also, International, etc., R. Co. v. Welsh, (Tex. Civ. App.) 24 S. W. R. 854. But it seems that in the California case there was not even standing room inside and the New York cases have been criticised by text writers. 2 Wood on Railroads, 1327; Patterson's Ry. Acc. Law, 284. See, also, Cleveland, etc., R. Co. v. Moneynun, (Ind.) 44 N. E. R. 1106. Some of the cases, however, make the same distinction in regard to riding on the platforms of street cars and hold

that it is not negligence *per se* where there is room inside. In Chicago, etc., R. Co. v. Dumser, 161 Ill. 190, 43 N. E. R. 698, it was held that one who had an excursion ticket, good only on a certain train, was not necessarily guilty of contributory negligence, as a matter of law, in standing on the platform of that train, when he did not know at the time he came to take the train that it was so crowded that he could not get inside. In Baltimore, etc., R. Co. v. Meyers, 62 Fed. R. 367, it was held that the Indiana statute relieving railroad companies from liability to passengers on the platform when notices prohibiting them from riding there have been properly posted does not apply to passengers who go upon the platform at the invitation of the brakeman for the purpose of alighting.

<sup>2</sup> Worthington v. Central Vt., etc., R. Co., 64 Vt. 107, s. c. 23 Atl. R. 590, 15 L. R. A. 326; Camden, etc., R. Co. v. Hoosey, 99 Pa. St. 492, s. c. 44 Am. R. 120; Chicago, etc., R. Co. v. Carroll, 5 Bradw. (Ill.) 201; Quinn v. Illinois Cent. R. Co., 51 Ill. 495; Goodwin v. Boston, etc., R. Co., 84 Me. 203, s. c. 24 Atl. R. 816. It appeared in the last case just cited that there was standing-room inside the car, but that the seats were all occupied; that the crowd and heat made it very uncomfortable inside the car, and that the conductor took the plaintiff's ticket while the latter was stand-

importance in determining the question of negligence or breach of duty on the part of the carrier, but we are unable to see its bearing upon the question of contributory negligence, especially where there is plenty of room to stand inside the car. In such a case the failure to furnish a seat does not make it any safer or any the less negligent to stand on the platform, and is not the proximate cause of the injury. In the case of ordinary street cars the danger is obviously much less, and it is generally held that it is not necessarily negligence *per se* to stand on the platform of a street car.<sup>1</sup> So, perhaps, in view of this fact and the general custom it is not necessarily negligence to stand

ing on the platform and made no objection to his standing there. "All these circumstances," said the court, "may have made it more agreeable to ride on the platform in the open air than to stand inside the hot, crowded car, but they did not in the least lessen the danger nor the appearance of danger in so doing. That Goodwin was not ordered off the platform could not have led him to believe it was safe to ride there. He needed no warning of such danger. He knew the place for passengers was inside the car. The discomfort of the hot and crowded car did not make it any more prudent for him to ride outside on the platform. Within the car, with all its discomforts, was safest. Without the car was obvious peril. The safe path is often more narrow and difficult than the way which leads to destruction, but no man is excused for that reason for seeking the one and avoiding the other."

<sup>1</sup> *Nolan v. Brooklyn City, etc., R. Co.*, 87 N. Y. 63, s. c. 41 Am. R. 345; *Upham v. Detroit City R. Co.*, 85 Mich. 12, s. c. 48 N. W. R. 199; *Germanatown, etc., R. Co. v. Walling*, 97 Pa. St. 55, s. c. 39 Am. R. 796; *Burns v. Bellefontaine R. Co.*, 50 Mo. 139; *Brusch v. St. Paul City R. Co.*, 52

Minn. 512, s. c. 55 N. W. R. 57; *Augusta, etc., R. Co. v. Renz*, 55 Ga. 126; *Marion St. R. Co. v. Shaffer*, 9 Ind. App. 486, s. c. 36 N. E. R. 861; *Maquire v. Middlesex, etc., R. Co.*, 115 Mass. 239; *Thirteenth St. R. Co. v. Boudrou*, 92 Pa. St. 475, s. c. 37 Am. R. 707; *Muldoon v. Seattle, etc., R. Co.*, 7 Wash. 528, s. c. 35 Pac. R. 422; *Highland Ave., etc., R. Co. v. Donovan*, 94 Ala. 299. No distinction seems to be made on account of the motive power, but in most of these cases stress is laid upon the fact that the cars were crowded, and, in the absence of such a showing, some of the courts and text writers think the better rule is that standing on the platform is negligence *per se*. This is certainly true if the passenger is knowingly violating a rule of the company. *Booth on Street Railways*, §§ 338, 339; *Beach on Contrib. Neg.*, §§ 293, 295; *Andrews v. Capitol, etc., R. Co.*, 2 Mackey 137, s. c. 47 Am. R. 266; *Graville v. Manhattan R. Co.*, 105 N. Y. 525; *Connolly v. Knickerbocker Ice Co.*, 114 N. Y. 104; *Aikin v. Frankford, etc., R. Co.*, 142 Pa. St. 47; *Willmott v. Corrigan, etc., Co.*, 106 Mo. 535, s. c. 17 S. W. R. 490. See, also, *Rights of Street Car Platform Passengers*, 20 Cent. L. Jour. 104.

upon the steps or footboards of crowded street cars.<sup>1</sup> But to stand on a coupling pin or bumper,<sup>2</sup> or to sit on the driver's high stool with feet elevated, or the like, so as to easily be thrown over backward by a jerk or rough motion of the street car,<sup>3</sup> is negligence *per se*. A passenger in going from one car to another in search of a seat, under the direction of the conductor, is not necessarily negligent,<sup>4</sup> and we presume that where the train is vestibuled standing on the platform within the vestibule, when no seat can be obtained, is not necessarily negligence *per se*. In such a case we suppose the question of contributory negligence is, ordinarily, for the jury to determine as a question of fact. But even if a passenger is rightfully upon the platform, under such circumstances that he is

<sup>1</sup> Cogswell v. West St., etc., R. Co., 5 Wash. 46, s. c. 31 Pac. R. 411; Clark v. Eighth Ave. R. Co., 36 N. Y. 135; Wood v. Brooklyn City R. Co., 38 N. Y. Supp. 1077; McGrath v. Brooklyn, etc., R. Co., 34 N. Y. Supp. 365, s. c. 87 Hun 310; Elliott v. Newport St. R. Co., 18 R. I. 707, 31 Atl. R. 694; Pray v. Omaha St. R. Co., 44 Neb. 167, 62 N. W. R. 447; Topeka City R. Co. v. Higgs, 38 Kan. 375, s. c. 15 Pac. R. 667. See, also, Lapointe v. Middlesex R. Co., 144 Mass. 18, s. c. 10 N. E. R. 497; Willmott v. Corrigan, etc., R. Co., (Mo.) 16 S. W. R. 500; Meesel v. Lynn, etc., R. Co., 8 Allen (Mass.) 234; Wilde v. Lynn, etc., R. Co., 163 Mass. 533, 40 N. E. R. 851. But compare Francisco v. Troy, etc., R. Co., 78 Hun 13, s. c. 29 N. Y. Supp. 247; Craighead v. Brooklyn City R. Co., 123 N. Y. 391, s. c. 25 N. E. R. 387; Schoenfeld v. Milwaukee City R. Co., 74 Wis. 433, s. c. 43 N. W. R. 162; Beach on Contrib. Neg., § 294; Booth on Street Railways, § 341.

<sup>2</sup> Bard v. Pennsylvania, etc., Co., (Pa. St.) 34 Atl. R. 953. Or to sit on the driving bar. Downey v. Hendrie, 46 Mich. 498.

<sup>3</sup> Mann v. Philadelphia, etc., Co.,

(Pa. St.) 34 Atl. R. 572. See, also, Wills v. Lynn, etc., R. Co., 129 Mass. 351; Randall v. Frankford, etc., R. Co., 139 Pa. St. 464; Hill v. Birmingham Union R. Co., 100 Ala. 447, s. c. 14 So. R. 201; Butler v. Pittsburgh, etc., R. Co., 139 Pa. St. 195, s. c. 21 Atl. R. 500.

<sup>4</sup> Dewire v. Boston, etc., R. Co., 148 Mass. 343, s. c. 2 L. R. A. 166; Louisville, etc., R. Co. v. Kelly, 92 Ind. 371, s. c. 47 Am. R. 149; Cotchett v. Savannah, etc., R. Co., 84 Ga. 687, s. c. 11 S. E. R. 553; Hannibal, etc., R. Co. v. Martin, 111 Ill. 219; Lent v. New York, etc., R. Co., 120 N. Y. 467; Atchison, etc., R. Co. v. McCandless, 33 Kan. 366; Cleveland, etc., R. Co. v. Manson, 30 Ohio St. 451. But it is otherwise if the passenger is going from one car to another merely for his own convenience or pleasure. Stewart v. Boston, etc., R. Co., 146 Mass. 605; Snowden v. Boston, etc., R. Co., 151 Mass. 220, s. c. 24 N. E. R. 40; State v. Maine Cent. R. Co., 81 Me. 84, s. c. 16 Atl. R. 368; McDaniel v. Hiland, etc., R. Co., 90 Ala. 64, s. c. 8 So. R. 41. But see Burt v. Douglas, etc., R. Co., 83 Wis. 229, s. c. 53 N. W. R. 447; Davis v. Louisville, etc., R. Co., 69 Miss. 136.

not necessarily guilty of contributory negligence as matter of law, it does not necessarily follow, although it may do so, that the company is negligent or that he is entitled to recover because he is injured by the jerking or oscillation of the train. It is matter of common knowledge, of which we think the courts ought to take judicial notice, that more or less of an oscillating or jerking motion is necessarily incident to the running of trains.<sup>1</sup> Ordinarily, however, an injury caused by a sudden and unnecessary jerk of the car will make a *prima facie* case, so far as the question of negligence on the part of the company is concerned. So the company is liable for injuries willfully caused by it to a passenger upon the platform, notwithstanding he is negligent in standing there, and there are also cases in which it may be liable because the act of the passenger in standing on the platform does not in fact proximately contribute to his injury.<sup>2</sup> This phase of the subject however, will be discussed in a subsequent section.

§ 1631. Injuries to passengers riding in baggage car.—A baggage car is “a known place of danger. In this respect it differs from the cow-catcher and platform only in degree. It is placed ahead of the passenger cars and next to or near the locomotive. In cases of collision it is the first car to give way to the shock, and frequently is the only one seriously injured.”<sup>3</sup> The danger from falling baggage in case of collision, derailment or a sudden jerk is also obvious. Railroad com-

<sup>1</sup> *President, etc., v. Cason*, 72 Md. 377, s. c. 20 Atl. R. 113; *Chicago, etc., R. Co. v. Hazzard*, 26 Ill. 373; *Rockford, etc., R. Co. v. Coultas*, 67 Ill. 398; *Illinois Cent. R. Co. v. Green*, 81 Ill. 19; *Siner v. Great Western R. Co.*, L. R. 4 Exch. 117; *Dublin, etc., R. Co. v. Slaterry*, L. R. 3 App. Cas. 1155; *Bemiss v. New Orleans, etc., R. Co.*, 47 La. 1671, 18 So. R. 711, 713; *Hite v. Metropolitan, etc., R. Co.*, 130 Mo. 132, 31 S. W. R. 262. So, the mere failure to provide a seat is not of itself, proof of negligence. *Burton v. West Jersey*

*Ferry Co.*, 114 U. S. 474, s. c. 5 Sup. Ct. R. 960. But see *Pray v. Omaha St. R. Co.*, 44 Neb. 167.

<sup>2</sup> *Zemp v. Wilmington, etc., R. Co.*, 9 Rich. L. 84; *Kansas, etc., R. Co. v. White*, 67 Fed. R. 481.

<sup>3</sup> *Paxson, J., in Pennsylvania R. Co. v. Langdon*, 92 Pa. St. 21, 27, s. c. 1 Am. & Eng. R. Cas. 87, 37 Am. R. 651. The carrier should not use a baggage car for the transportation of passengers. *Baltimore, etc., R. Co. v. Swann*, 81 Md. 400, 32 Atl. R. 175.

panies generally, if not universally, provide in their rules and regulations that passengers shall not ride in the baggage car, and such a rule is not only reasonable, but is also one, we think, which a conductor or other employe has no authority to waive so as to bind the company under ordinary circumstances.<sup>1</sup> Even in the absence of proof of any such regulation the fact is well known that the proper place for passengers is in the cars fitted up for that purpose and that a baggage car is a more dangerous place. A railroad company is not liable, therefore, for an injury to a passenger who voluntarily rides in a baggage car for his own pleasure or convenience, if riding therein was the proximate cause of his injury.<sup>2</sup> But if he would have been injured just the same had he been riding where he belonged, in the passenger car, so that riding in the baggage car was not a proximate cause of his injury, it will not be considered such contributory negligence as to defeat his right, if any he has, to recover damages from the railroad company.<sup>3</sup>

<sup>1</sup> *Pennsylvania R. Co. v. Langdon*, 92 Pa. St. 21; *Reary v. Louisville, etc., R. Co.*, 40 La. Ann. 32, s. c. 34 Am. & Eng. R. Cas. 277; *Hickey v. Boston, etc., R. Co.*, 14 Allen (Mass.) 429; *Beach on Contrib. Neg.*, § 152; 2 Woods on Railroads, (Minor's ed.) 1277; *post*, § 1643. But see *Jacobus v. St. Paul, etc., R. Co.*, 20 Minn. 125; *Carroll v. New York, etc., R. Co.*, 1 Duer (N. Y.) 571; *Florida, etc., R. Co. v. Hirst*, 30 Fla. 1, s. c. 11 So. R. 506; *Watson v. Northern, etc., R. Co.*, 24 U. C. Q. B. 98; *Washburn v. Nashville, etc., R. Co.*, 3 Head (Tenn.) 638; *Dunn v. Grand Trunk R. Co.*, 58 Me. 187, s. c. 10 Am. L. Reg. (N. S.) 615; *Cody v. New York, etc., R. Co.*, 151 Mass. 462. Postal clerk riding in postal car may recover although it may be more dangerous. *Baltimore, etc., R. Co. v. State*, 72 Md. 36; *Gulf, etc., R. Co. v. Wilson*, 79 Tex. 371, 15 S. W. R. 280.

<sup>2</sup> *Houston, etc., R. Co. v. Clem-*

*mons*, 55 Tex. 88, s. c. 40 Am. R. 799; *Peoria, etc., R. Co. v. Lane*, 83 Ill. 448, and authorities cited in following note. So where a passenger rides in a "show car." *Blake v. Burlington, etc., R. Co.*, 78 Iowa 57, s. c. 39 Am. & Eng. R. Cas. 405.

<sup>3</sup> *Kentucky Cent. R. Co. v. Thomas*, 79 Ky. 160, s. c. 42 Am. R. 208; *Jones v. Chicago, etc., R. Co.*, 43 Minn. 279, s. c. 45 N. W. R. 444; *Webster v. Rome, etc., R. Co.*, 115 N. Y. 112, s. c. 21 N. E. R. 725; *O'Donnell v. Allegheny, etc., R. Co.*, 59 Pa. St. 239; *New York, etc., R. Co. v. Ball*, 53 N. J. L. 283, s. c. 21 Atl. R. 1052. But see *Higley v. Gilmer*, 3 Mont. 90; *Atchison, etc., R. Co. v. Flinn*, 24 Kan. 627; *Beach on Contrib. Neg.*, §§ 150, 152. Mr. Beach inclines toward the opinion that one who rides in a baggage car, contrary to the rules of the company, is a *quasi* trespasser and can not recover as a passenger no

§ 1632. **Injuries received by passengers riding in other dangerous and improper places.**—It seems clear that travelers ought to know that they can not expect to be carried as passengers upon an engine,<sup>1</sup> nor upon a hand-car,<sup>2</sup> and that an employe has no implied authority, under ordinary circumstances, to receive them as passengers in such a place. So, it would seem that to ride upon the cow-catcher or pilot of an engine is clearly contributory negligence as matter of law.<sup>3</sup> These rules apply also to riding on the top of a car.<sup>4</sup> But there are cases in which it has been held that a passenger is justified in riding on top of a car under the direction of the conductor.<sup>5</sup> It seems to us, however, that such an act is so obviously dangerous that, except, perhaps, in case of an emer-

matter whether the injury would have been sustained or not if he had remained in his proper place.

<sup>1</sup> *Robertson v. New York, etc., R. Co.*, 22 Barb. (N. Y.) 91; *Files v. Boston R. Co.*, 149 Mass. 204, s. c. 21 N. E. R. 311; *Waterbury v. New York, etc., R. Co.*, 17 Fed. R. 671, and note; *Stringer v. Missouri Pac. R. Co.*, 96 Mo. 299; *Chicago, etc., R. Co. v. Michie*, 83 Ill. 427; *Woolsey v. Chicago, etc., R. Co.*, 39 Neb. 798, s. c. 58 N. W. R. 444; *Virginia, etc., R. Co. v. Roach*, 83 Va. 375, s. c. 5 S. E. R. 175; *Texas, etc., R. Co. v. Boyd*, 6 Tex. Civ. App. 205, s. c. 24 S. W. R. 1086; *ante*, § 1581, p. 2463, note 4. But see *Nashville, etc., R. Co. v. Erwin*, (Tenn.) 3 Am. & Eng. R. Cas. 465.

<sup>2</sup> See *ante*, § 1582; *Gulf, etc., R. Co. v. Dawkins*, 77 Tex. 228, 13 S. W. R. 982; *International, etc., R. Co. v. Cock*, 68 Tex. 713, 5 S. W. R. 635; *Hoar v. Maine Central R. Co.*, 70 Me. 65; *Graham v. Toronto, etc., R. Co.*, 23 U. C. C. P. 541. But compare *International, etc., R. Co. v. Prince*, 77 Tex. 560, 14 S. W. R. 171; *Pool v. Chicago, etc., R. Co.*, 56 Wis. 227, 8 Am. & Eng. R. Cas. 360, 14 N. W. R. 46.

<sup>3</sup> *Thompson on Carriers*, 265; *Railroad Co. v. Jones*, 95 U. S. 439; *Doggett v. Illinois Cent. R. Co.*, 34 Iowa 284; *Rucker v. Missouri Pac. R. Co.*, 61 Tex. 499, s. c. 21 Am. & Eng. R. Cas. 245; *McGucken v. Western, etc., R. Co.*, 77 Hun 69, s. c. 28 N. Y. Supp. 298; *Brown v. Scarboro*, 97 Ala. 316, s. c. 12 So. R. 289; *Downey v. Chesapeake, etc., R. Co.*, 28 W. Va. 732; *Virginia, etc., R. Co. v. Roach*, 83 Va. 375. But see *Wabash, etc., R. Co. v. Shacklet*, 105 Ill. 364, s. c. 12 Am. & Eng. R. Cas. 166; *Hanson v. Mansfield R. Co.*, 38 La. Ann. 111.

<sup>4</sup> *Atchison, etc., R. Co. v. Lindley*, 42 Kan. 714, s. c. 22 Pac. R. 703; *Tuley v. Chicago, etc., R. Co.*, 41 Mo. App. 432; *Little Rock, etc., R. Co. v. Miles*, 40 Ark. 298, s. c. 48 Am. R. 10.

<sup>5</sup> *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291; *Tibby v. Missouri Pac. R. Co.*, 82 Mo. 292; *Chicago, etc., R. Co. v. Carpenter*, 56 Fed. R. 451; *Saunders v. Southern Pac. R. Co.*, (Utah) 44 Pac. R. 932. (Company held liable to drover struck by low bridge when compelled to walk on top of car in order to reach his stock and return to eaboose.)

gency, a passenger can not do so, even with the consent of the conductor, and still hold the company liable to him the same as if he had remained in the place provided for passengers.<sup>1</sup> This, we think, is true, not only because such conduct would, ordinarily at least, be negligent, and because the traveler should be deemed to have assumed the increased risks of his hazardous position, but also because he must know that a conductor, under ordinary circumstances, can have no power to authorize passengers to ride on top of cars.<sup>2</sup> The company may, of course, be liable to one who is invited or directed to take such a position, or even to one who is clearly a trespasser, for willfully injuring him, and there may be cases in which it will also be liable for negligently injuring him after discovering his danger, but it is not, we think, liable to him as a passenger; that is, he can not insist upon that high degree of care and comparative immunity from injury to which a passenger in his proper place inside the car is entitled. The duties and liabilities of the carrier in such cases have been elsewhere considered.<sup>3</sup> One who rides in a stock car, in pursuance of a contract with the company, to take care of the stock, assumes the increased danger and discomforts necessarily incident thereto, but is not guilty of contributory negligence in so doing.<sup>4</sup>

**§ 1633. Injuries received by passenger occupying an improper position in car.**—A passenger may be guilty of contrib-

<sup>1</sup> See *St. Louis, etc., R. Co. v. Rice*, (Tex. Civ. App.) 29 S. W. R. 525; *Ft. Scott, etc., R. Co. v. Sparks*, 55 Kan. 288, 39 Pac. R. 1032; *Texas, etc., R. Co. v. Boyd*, 6 Tex. Civ. App. 205, s. c. 24 S. W. R. 1086; *Downey v. Chesapeake, etc., R. Co.*, 28 W. Va. 732.

<sup>2</sup> As to general doctrine that a passenger is negligent in obeying the directions of the servant when he is thereby placed in obvious and known danger, see *Pennsylvania R. Co. v. Hoagland*, 78 Ind. 203; *Louisville, etc., R. Co. v. Kelly*, 92 Ind. 371, 13 Am. & Eng. R. Cas. 1, and authorities

cited in note; *Pool v. Chicago, etc., R. Co.*, 56 Wis. 227; *post*, § 1642.

<sup>3</sup> *Ante*, §§ 1255, 1581, 1582.

<sup>4</sup> *Lawson v. Chicago, etc., R. Co.*, 64 Wis. 447; *Florida, etc., R. Co. v. Webster*, 25 Fla. 394; *ante*, § 1629, p. 2553, note 9. A passenger on a freight train who voluntarily rides in the stock car instead of in the caboose assumes the risk and can not recover for injuries which he would not otherwise have sustained. *Atchison, etc., R. Co. v. Johnson*, 3 Okl. 41, 41 Pac. R. 641.



utory negligence not only in going into a dangerous place not intended for passengers but also in assuming a dangerous position in or upon a passenger car. Thus, where a passenger rides with his arm or head outside of the window he is, according to the weight of authority, guilty of negligence as matter of law, and can not recover for injuries received by reason of his arm or head coming in contact with some external object while in such position.<sup>1</sup> But it has been held that it is not negligence *per se* for a passenger having a severe headache to rest his elbow on the window-sill and that he may recover in such a case for injuries received where his elbow is forced outside the window by a sudden jolt and injured by coming in contact with a freight car which the railroad company had left upon the siding too near the main track.<sup>2</sup> As we have elsewhere shown, even where it is held that riding upon the platform of a street car is not negligence *per se*, a passenger is

<sup>1</sup>Todd v. Old Colony, etc., R. Co., 3 Allen (Mass.) 18, s. c. 7 Allen 207, 80 Am. Dec. 49; Favre v. Louisville, etc., R. Co., 91 Ky. 541, s. c. 16 S. W. R. 370; Louisville, etc., R. Co. v. Sickings, 5 Bush (Ky.) 1; Indianapolis, etc., R. Co. v. Rutherford, 29 Ind. 82; Pittsburgh, etc., R. Co. v. Andrews, 39 Md. 329, s. c. 17 Am. R. 568; Pittsburgh, etc., R. Co. v. McClurg, 56 Pa. St. 294; Holbrook v. Utica, etc., R. Co., 12 N. Y. 236; Morel v. Mississippi, etc., Co., 4 Bush (Ky.) 535; Dale v. Delaware, etc., R. Co., 73 N. Y. 468; Dun v. Seaboard, etc., R. Co., 78 Va. 645, s. c. 16 Am. & Eng. R. Cas. 363; Georgia, etc., R. Co. v. Underwood, 90 Ala. 49, s. c. 8 So. R. 116. See, also, Richmond, etc., R. Co. v. Scott, 88 Va. 958, s. c. 14 S. E. R. 763; Coleman v. Second Ave. R. Co., 114 N. Y. 609; Moore v. Edison, etc., Co., 43 La. Ann. 792, s. c. 9 So. R. 433.

<sup>2</sup>Farlow v. Kelly, 108 U. S. 288, s. c. 2 Sup. Ct. R. 555. See, also, Spencer v. Milwaukee, etc., R. Co., 17

Wis. 487; Chicago, etc., R. Co. v. Pondrom, 51 Ill. 333; Summers v. Crescent, etc., R. Co., 34 La. Ann. 139; Germantown, etc., R. Co. v. Brophy, 105 Pa. St. 38, s. c. 16 Am. & Eng. R. Cas. 361; Dahlberg v. Minneapolis, etc., R. Co., 32 Minn. 404, s. c. 18 Am. & Eng. R. Cas. 202; Quinn v. South Carolina R. Co., 29 S. Car. 381, s. c. 7 S. E. R. 614; Gulf, etc., R. Co. v. Danshank, 6 Tex. Civ. App. 385, s. c. 25 S. W. R. 295; North Baltimore, etc., R. Co. v. Kaskell, 78 Md. 517, s. c. 28 Atl. R. 410; Gulf, etc., R. Co. v. Killebrew, (Tex.) 20 S. W. R. 182; Winters v. Hannibal, etc., R. Co., 39 Mo. 468; Moakler v. Willamette, etc., R. Co., 18 Ore. 189, s. c. 41 Am. & Eng. R. Cas. 135; Breen v. New York, etc., R. Co., 109 N. Y. 297; Carrico v. West Virginia R. Co., 35 W. Va. 389, s. c. 14 S. E. R. 12; New Orleans, etc., R. Co. v. Schneider, 60 Fed. R. 210; Louisville, etc., R. Co. v. Snyder, 117 Ind. 435, s. c. 20 N. E. R. 284.

guilty of negligence if he assumes a position of obvious danger upon the platform.<sup>1</sup> So, in a recent case a passenger upon an excursion train who seated himself on a railing at the rear end of an open car in which passengers were carried with his feet elevated by being placed on a seat in front of him, so that there was no possible way of protecting himself in case of a sudden jolt, was held guilty of contributory negligence as matter of law.<sup>2</sup> It is generally a question of fact for the jury to determine whether a passenger is guilty of contributory negligence in standing up in a passenger car,<sup>3</sup> but to voluntarily and unnecessarily stand up in a freight car, which is more liable to sudden jerks, has been held to be negligence as matter of law.<sup>4</sup> It is not contributory negligence for a passenger to walk from his seat to the water closet while the car is in motion,<sup>5</sup> nor for him to go to the wash-room in a Pullman car in which he is riding for the purpose of washing his hands.<sup>6</sup> It has also been held that it is not necessarily contributory negligence for a passenger to take hold of the brake wheel in boarding a pas-

<sup>1</sup> *Ante*, § 1630. See, also, *Carroll v. Interstate, etc., Co.*, 107 Mo. 653, 17 S. W. R. 889.

<sup>2</sup> *Jackson v. Crilly*, 16 Colo. 103, s. c. 26 Pac. R. 331.

<sup>3</sup> *Wylde v. Northern R. Co.*, 53 N. Y. 156; *Barden v. Boston, etc., R. Co.*, 121 Mass. 426; *Lapointe v. Middlesex R. Co.*, 144 Mass. 18, s. c. 10 N. E. R. 497; *Whipple v. West Phila. R. Co.*, 11 Phila. (Pa.) 345; *Gee v. Metropolitan R. Co.*, L. R. 8 Q. B. 161; *Colwell v. Manhattan R. Co.*, 57 Hun (N. Y.) 452; *Griffith v. Utica, etc., R. Co.*, 17 N. Y. Supp. 692. But see *De Soucey v. Manhattan R. Co.*, 15 N. Y. Supp. 108; *Beach on Contrib. Neg.*, § 295.

<sup>4</sup> *Wallace v. Western, etc., R. Co.*, 98 N. Car. 494, s. c. 2 Am. St. R. 346; *Harris v. Hannibal, etc., R. Co.*, 89 Mo. 233, s. c. 58 Am. R. 111; *ante*, § 1629. So where a passenger in a passenger coach stood up on a seat to get a bundle. *East Tennessee, etc., R.*

*Co. v. Green*, 95 Ga. 376, s. c. 22 S. E. R. 658.

<sup>5</sup> *Lavis v. Wisconsin Cent. R. Co.*, 54 Ill. App. 636. Nor to sit near a car stove. *Texas, etc., R. Co. v. Stuart*, 1 Tex. Civ. App. 642, s. c. 20 S. W. R. 962. For a peculiar case in which a railroad company was held not to be liable to a female passenger locked in water-closet by reason of a defective lock, see *Gulf, etc., R. Co. v. Smith*, (Tex. Civ. App.) 30 S. W. R. 361.

<sup>6</sup> *Sturdivant v. Ft. Worth, etc., R. Co.*, (Tex. Civ. App.) 27 S. W. R. 170. See, also, *Piper v. New York Cent. R. Co.*, 76 Hun 44, s. c. 27 N. Y. Supp. 593. But in going to the engine to get water because there was none in the passenger coach, a passenger was correctly held negligent as matter of law in *McDaniel v. Highland Ave., etc., R. Co.*, 90 Ala. 64, s. c. 8 So. R. 41.

senger car<sup>1</sup> nor for him to place his hand, in preparing to alight, where it will be caught by the closing of the door, due to a sudden starting or stopping of the train after passengers have been invited to alight,<sup>2</sup> but it does not necessarily follow that the railroad company is always liable to one who gets his fingers caught in this way. In one case it appeared that the injury was the result of pure accident, without fault on either side, and it was held that the railroad company was not liable.<sup>3</sup>

§ 1634. *Injuries caused by derailment.*—We have already considered, in a general way, the duties of railroad companies respecting their road-beds, tracks and equipments and the care required in the operation of their trains.<sup>4</sup> One of the most common accidents or causes of injury to passengers upon railroads is derailment of the cars. This may be caused by the negligence of the company in failing to perform its duties respecting any of the matters above specified, or it may be caused by something over which the company has no control. In the former case the company is liable to a passenger who is free

<sup>1</sup> *Cleveland, etc., R. Co. v. McHenry*, 47 Ill. App. 301. It seems to us, however, that under ordinary circumstances, a passenger should not touch the brake wheel in getting on the car, and it is certainly not intended to be so used.

<sup>2</sup> *Madden v. Missouri Pac. R. Co.*, 50 Mo. App. 666. But in a somewhat similar recent case it was said that "placing his hand in such a position upon the jamb of the door that it would certainly be injured by any one closing the door was an act of negligence." *Texas, etc., R. Co. v. Overall*, 82 Tex. 247, s. c. 18 S. W. R. 142. See, also, *Atchison, etc., R. Co. v. Johnson*, 3 Okla. 41, 41 Pac. R. 641; *Warburton v. Midland R. Co.*, 21 L. T. 835; *Gee v. Metropolitan, etc., R. Co.*, L. R. 8 Q. B. 161, 21 W. R. 584; *Thompson v. Duncan*, 76 Ala. 334;

*Adams v. Lancashire, etc., R. Co.*, L. R. 4 C. P. 739, s. c. 17 W. R. 884. But compare *Western Md. R. Co. v. Stanley*, 61 Md. 266, s. c. 48 Am. R. 96; *Kentucky, etc., R. Co. v. Quinkert*, 2 Ind. App. 244, s. c. 28 N. E. R. 338.

<sup>3</sup> *Murphy v. Atlanta, etc., R. Co.*, 89 Ga. 832, s. c. 15 S. E. R. 774. The company is not negligent merely because the upper part of the door is not all glass so that persons on each side can see each other when about to open it, nor is it negligent to have a small projecting screw in the door for the purpose of holding it back. *Graeff v. Philadelphia, etc., R. Co.*, 161 Pa. St. 230, s. c. 28 Atl. R. 1107. Compare also *Sturdivant v. Ft. Worth, etc., R. Co.*, (Tex. Civ. App.) 27 S. W. R. 170; *Hayman v. Pennsylvania R. Co.*, 118 Pa. St. 508, s. c. 11 Atl. R. 815.

<sup>4</sup> *Ante*, §§ 1586, 1587, 1589.

from contributory negligence and in the latter case it is not. In other words, if it is caused by the failure of the company to exercise the highest degree of care which is practicable and usual in the maintenance, management and operation of a railroad and a passenger is injured thereby as a proximate cause of the company's breach of duty, without contributory negligence on his part, it is liable; but if his own negligence proximately contributed thereto, or if there is no failure to exercise such care on the part of the company, it is not liable. As such so-called accidents do not ordinarily happen, however, unless the company fails to exercise such care, and as it is better able to explain how they happened, proof of the derailment of the car and injury thereby caused to the passenger generally raises a presumption that the company was negligent.<sup>1</sup> But this presumption is not conclusive,<sup>2</sup> for it may be rebutted by showing that the injury arose from an unavoidable accident or an occurrence which could not have been prevented by the highest practicable degree of care and foresight.<sup>3</sup> Thus, it may be re-

<sup>1</sup> Louisville, etc., R. Co. v. Jones, 108 Ind. 551, s. c. 9 N. E. R. 476, 28 Am. & Eng. R. Cas. 170; Denver, etc., R. Co. v. Woodward, 4 Colo. 1; Norton v. St. Louis, etc., R. Co., 40 Mo. App. 642; Furnish v. Missouri Pac. R. Co., 102 Mo. 438, s. c. 13 S. W. R. 1044; Montgomery, etc., R. Co. v. Mallette, 92 Ala. 209, s. c. 9 So. R. 363; Stevens v. European, etc., R. Co., 66 Me. 74; St. Louis, etc., R. Co. v. Mitchell, 57 Ark. 418, s. c. 21 S. W. R. 883; Spellman v. Lincoln, etc., Co., 36 Neb. 890, s. c. 55 N. W. R. 270 (street car case). See, also, Louisville, etc., R. Co. v. Miller, 140 Ind. 685, s. c. 37 N. E. R. 343, 40 N. E. R. 116; Peoria, etc., R. Co. v. Reynolds, 88 Ill. 418; Baltimore, etc., R. Co. v. Worthington, 21 Md. 275; Dawson v. Manchester, etc., R. Co., 5 L. T. R. (N. S.) 682. But in a number of cases it is held that this presumption does not arise as a matter of law without

proof of other circumstances. Texas, etc., R. Co. v. Buckelew, 3 Tex. Civ. App. 272, s. c. 22 S. W. R. 994; San Antonio, etc., R. Co. v. Robinson, 73 Tex. 277, s. c. 11 S. W. R. 327; Transportation Co. v. Downer, 11 Wall. (U. S.) 129.

<sup>2</sup> Pattee v. Chicago, etc., R. Co., 5 Dak. 267, s. c. 38 N. W. R. 435, 34 Am. & Eng. R. Cas. 399, and authorities cited in following notes.

<sup>3</sup> Eldridge v. Minneapolis, etc., R. Co., 32 Minn. 253, s. c. 20 N. W. R. 151, 21 Am. & Eng. R. Cas. 494; McClary v. Sioux City, etc., R. Co., 3 Neb. 44; Wabash, etc., R. Co. v. Friedman, 41 Ill. App. 270; Eureka, etc., R. Co. v. Timmons, 51 Ark. 459, s. c. 11 S. W. R. 690, 40 Am. & Eng. R. Cas. 698; Hipsley v. Kansas City, etc., R. Co., 88 Mo. 348, s. c. 27 Am. & Eng. R. Cas. 287; Pittsburgh, etc., R. Co. v. Williams, 74 Ind. 462; Southern Kan., etc., R. Co. v. Walsh, 45

butted by showing that the derailment and injury were caused by the act of a stranger which the company could not have foreseen and anticipated.<sup>1</sup> So, where the derailment is caused by a broken rail, the presumption against the company may be overcome by showing that the rails were properly inspected, tested and laid and that the accident was caused by the cold or the like, notwithstanding the exercise of the highest practicable degree of care on the part of the company.<sup>2</sup> In a recent case it appeared that the train was derailed by reason of the breaking of a wheel which had been carefully inspected and showed no defects; that there was nothing in the track, road-bed or other equipments nor in the speed of the train to cause the accident; that a passenger told the conductor that he felt a jolt and heard an unusual noise before the accident, and the conductor thereupon listened and looked inside and outside the car without discovering anything wrong, but did not stop it, and that soon afterwards the car was derailed and the plaintiff injured. It was held that as there had been a proper inspection the company was not liable for the injury caused by the hidden defect,<sup>3</sup> and that it was not liable because the conductor failed to stop the car.<sup>4</sup> In another recent case the

Kan. 653, s. c. 26 Pac. R. 45; *Ward v. Bonner*, 80 Tex. 168, s. c. 15 S. W. R. 805; *Andrews v. Chicago, etc., R. Co.*, 86 Iowa 677, s. c. 53 N. W. R. 399. The circumstances as detailed by the plaintiff himself may be such as to rebut or prevent the presumption from arising. See *Smith v. St. Paul, etc., R. Co.*, 32 Minn. 1, s. c. 18 N. W. R. 827, 50 Am. R. 550; *Gillespie v. St. Louis, etc., R. Co.*, 6 Mo. App. 554.

<sup>1</sup> *Dimmitt v. Hannibal, etc., R. Co.*, 40 Mo. App. 654; *Houston, etc., R. Co. v. Lee*, 69 Tex. 556, 7 S. W. R. 324, s. c. 34 Am. & Eng. R. Cas. 452. See, also, *Fredericks v. Northern Cent. R. Co.*, 157 Pa. St. 103, s. c. 27 Atl. R. 689.

<sup>2</sup> *Heazle v. Indianapolis, etc., R. Co.*, 76 Ill. 501; *Cleveland, etc., R.*

*Co. v. Newell*, 75 Ind. 542; *Michigan, etc., R. Co. v. Lantz*, 29 Ind. 528; *McPadden v. New York, etc., R. Co.*, 44 N. Y. 478; *Canadian Pac. R. Co. v. Chalifoux*, 22 Can. S. Ct. R. 721. But compare *Pittsburgh, etc., R. Co. v. Williams*, 74 Ind. 462; *Reed v. New York Central, etc., R. Co.*, 56 Barb. (N. Y.) 493.

<sup>3</sup> Citing *Hutch. Carr.*, §§ 497, 508; *Toledo, etc., R. Co. v. Beggs*, 85 Ill. 80; *Grand Rapids, etc., R. Co. v. Huntley*, 38 Mich. 537, 548; *McPadden v. New York, etc., R. Co.*, 44 N. Y. 478, 481. See, also, *Texas, etc., R. Co. v. Buckalew*, (Tex. Civ. App.) 34 S. W. R. 165.

<sup>4</sup> *Frelson v. Southern Pac. R. Co.*, 42 La. Ann. 673, s. c. 7 So. R. 800, 44 Am. & Eng. R. Cas. 319.

accident occurred on a dark and rainy night by reason of an embankment being washed out by a water-spout or water which backed up from a culvert that failed to carry off the extraordinary rainfall, and it was held that the railroad company was not liable.<sup>1</sup>

§ 1635. *Collisions.*—Where a passenger is injured in a collision between two trains of the same railroad company the only questions that can well arise are as to whether it was caused by the failure of the company to exercise that high degree of care which it owes to its passengers and as to whether the passenger was guilty of contributory negligence. As we have elsewhere seen, if the passenger was wrongfully or negligently riding in an improper car or place, and would not have been injured if riding in a proper place, he can not recover;<sup>2</sup> but, according to what we regard as the better rule, the mere fact that he was riding in what might be regarded as a more dangerous place than his seat in the passenger coach will not defeat a recovery if he would have been injured just the same. As we shall hereafter show,<sup>3</sup> proof of the collision and injury caused thereby to a passenger usually makes a *prima facie* case of negligence against the company, for the general rule is that in such a case the collision itself gives rise to the presumption of negligence on its part.<sup>4</sup> So, we suppose that the

<sup>1</sup> *Norfolk, etc., R. Co. v. Marshall's Admr.*, 90 Va. 836, s. c. 20 S. E. R. 823. Where, however, a train was derailed and a passenger injured by an animal wounded by a preceding train and left on or near the track, the railroad company was held liable. *Mexican Cent. R. Co. v. Lauricella*, 87 Tex. 277, s. c. 28 S. W. R. 277.

<sup>2</sup> But a passenger who sees a train on an intersecting road approaching the crossing is not guilty of contributory negligence in failing to pull the bell rope or warn the engineer. *Grand Rapids, etc., R. Co. v. Ellison*, 117 Ind. 234, s. c. 20 N. E. R. 135, 39 Am. & Eng. R. Cas. 480. Nor in leaping

from the car in an attempt to avoid a collision if a person of ordinary prudence would have done so. *Towmley v. Central Park, etc., R. Co.*, 69 N. Y. 158; *Buel v. New York, etc., R. Co.*, 31 N. Y. 314. See, also *Tillett v. Norfolk, etc., R. Co.*, (N. Car.) 24 S. E. R. 111.

<sup>3</sup> *Post*, § 1644.

<sup>4</sup> *Rouse v. Hornsby*, 67 Fed. R. 219; *New Orleans, etc., R. Co. v. Allbritton*, 38 Miss. 242; *Skinner v. London, etc., R. Co.*, 5 Ex. 787; *Iron R. Co. v. Mowery*, 36 Ohio St. 418, s. c. 3 Am. & Eng. R. Cas. 361. See, also, *Louisville, etc., R. Co. v. Faylor*, 126 Ind. 126, s. c. 25 N. E. R. 869; *Louis-*

same presumption ordinarily arises where a passenger train breaks apart and one section collides with the other, but it is well known that it is almost impossible to always prevent this in the case of freight trains, and, in such a case, the presumption might not so readily arise and the passenger might, perhaps, be deemed to have assumed the risk.<sup>1</sup> Where, however, it appears that the brakemen had left their posts and were riding in the engine and caboose at the time of the parting and collision, in violation of the rules of the company, there is sufficient evidence of negligence to go to the jury, although the cars had been inspected shortly before the break occurred.<sup>2</sup> A railroad company can not escape liability for injury to a passenger upon its train caused by its own negligence in coming into collision at a crossing with a train on another road, although the other railroad company was also negligent, and it was held in a recent case that this is true although the other company was more negligent than it was, provided that by the exercise of the care and diligence which a railroad company owes a passenger it could have avoided the injury.<sup>3</sup> So, on the other hand, in another recent case it was held that

ville, etc., R. Co. v. Long, 94 Ky. 410, 22 S.W.R. 747; West Chicago St.R.Co., v. Martin, 47 Ill. App. 610. But compare Mars v. President of Delaware, etc., R. Co., 54 Hun 625, s. c. 8 N. Y. Supp. 107. As to what is sufficient to rebut the presumption, see Fredericks v. Northern, etc., R. Co., 157 Pa. St. 103, s. c. 27 Atl. R. 689; Pennsylvania R. Co. v. McKinney, 124 Pa. St. 462; Deyo v. New York, etc., R. Co., 34 N. Y. 9.

<sup>1</sup> But see Georgia Pac. R. Co. v. Love, 91 Ala. 432, s. c. 8 So. R. 714, and authorities cited in following note.

<sup>2</sup> Delaware, etc., R. Co. v. Ashley, 67 Fed. R. 209. The inspection, however, was also claimed to be negligent and insufficient. See, also, Tillett v. Norfolk, etc., R. Co., (N. Car.)

24 S. E. R. 111; Louisville, etc., R. Co. v. Faylor, 126 Ind. 126, s. c. 25 N. E. R. 869.

<sup>3</sup> Chicago, etc., R. Co. v. Ransom, (Kan.) 44 Pac. R. 6; Eaton v. Boston, etc., R. Co., 11 Allen (Mass.) 500, s. c. 87 Am. Dec. 730; Clark v. Chicago, etc., R. Co., 127 Mo. 197, 29 S. W. R. 1013; Union Pac. R. Co. v. Harris, 158 U. S. 326, s. c. 15 Sup. Ct. R. 843; Graham v. Great Western R. Co., 41 U. C. Q. B. 324. It was also held in the Kansas case that the rules of railroad commissioners governing the management of trains at grade crossings of railroads are not admissible in evidence without showing that they have been served upon or brought to the knowledge of the company against which they are offered.

a railroad company which operates a train in charge of its own servants on the track of another company under an arrangement that the train dispatcher and operators employed by such other company may stop the train at pleasure at any telegraph station, is liable in damages for injuries resulting in the death of a passenger on the train of such other company by reason of the negligence of the engineer in running into it, although the negligence of the train dispatcher and operators and crew of the train of such other company may have been greater than that of such engineer.<sup>1</sup> But the company owning the track and carrying the passenger was not a party in the case to which we have just referred, and nothing was decided as to whether or not it might have been held liable. The general rule is that where a person is injured by the concurrent negligence of two companies in causing a collision he may recover of both jointly, or of either of them.<sup>2</sup> His relation to one of them as

<sup>1</sup> Chicago, etc., R. Co. v. Groves, Kan.) 44 Pac. R. 628. The court did not decide the case upon the ground that the train dispatcher and operatives were joint employes of the two companies, or, in the particular matter, employes of the company whose business they were attending to for the time-being, although it was said that, perhaps, they might be so considered under the evidence, and the following cases were cited as tending to support that contention: Hannibal, etc., R. Co. v. Martin, 11 Ill. App. 386-390; Wabash, etc., R. Co. v. Peyton, 106 Ill. 534-540; Nashville, etc., R. Co. v. Carroll, 6 Heisk. 347, 352, 354; Vary v. Burlington, etc., R. Co., 42 Iowa 246. Many other cases hold that a passenger who is without fault, may recover for injuries inflicted by the negligence of another company in running its train into that of the company which is carrying him, even though the latter company may also be guilty of negligence. Pittsburgh, etc., R. Co. v. Spencer, 98 Ind. 186; Robinson v.

New York Cent., etc., R. Co., 66 N. Y. 11, s. c. 23 Am. R. 1; Chapman v. New Haven, etc., R. Co., 19 N. Y. 341; Wylde v. Northern R. Co., 53 N. Y. 156; Danville, etc., R. Co. v. Stewart, 2 Met. (Ky.) 119; Bennett v. New Jersey, etc., R. Co., 36 N. J. L. 225, s. c. 13 Am. R. 435; Wabash, etc., R. Co. v. Shacklet, 105 Ill. 364, s. c. 44 Am. R. 791; Kansas City, etc., R. Co. v. Stoner, 51 Fed. R. 649. But see People's, etc., R. Co. v. Lauderbach, (Pa. St.) 3 Atl. R. 672, s. c. 26 Am. & Eng. R. Cas. 166.

<sup>2</sup> Cuddy v. Horn, 46 Mich. 596, s. c. 41 Am. R. 178; Wabash, etc., R. Co. v. Shacklet, 105 Ill. 364, s. c. 44 Am. R. 791, 12 Am. & Eng. R. Cas. 166; Transfer Co. v. Kelly, 36 Ohio St. 86, s. c. 38 Am. R. 558; Flaherty v. Minneapolis, etc., R. Co., 39 Minn. 328, s. c. 40 N. W. R. 160; Colegrove v. New York, etc., R. Co., 20 N. Y. 492, s. c. 75 Am. Dec. 418; Kansas City, etc., R. Co. v. Stoner, 51 Fed. R. 649; Central Pass. R. Co. v. Kuhn, 86 Ky. 578. But see Richmond, etc., R. Co. v.



a passenger, however, may sometimes render it easier for him to recover against that one.<sup>1</sup>

§ 1636. **Injuries from obstructions.**—A railroad company is liable to a passenger who, without fault on his part, is injured by reason of its tracks being so close together that its trains strike each other, by leaving a car on a switch so that the train on which he is riding collides with it,<sup>2</sup> or by reason of its placing or negligently permitting obstructions to be placed and remain on or dangerously near the track.<sup>3</sup> But it is not liable for injuries caused solely by the act of strangers in putting obstructions on the track, where it is guilty of no negligence.<sup>4</sup> We have treated one phase of this subject in considering the duties and liabilities of railroad companies to their employes,<sup>5</sup> but obstructions which might be dangerous to employes may be perfectly safe for passengers when they are in their proper place. Thus, a post, a fence, a low bridge, or the like might be dangerous to employes whose duty calls them on

Greenwood, 99 Ala. 501, 14 So. R. 495. Where both are sued and one is wholly at fault a charge that the verdict should be against that one and in favor of the other has been held proper. *Houston, etc., R. Co. v. Ross*, (Tex. Civ. App.) 28 S. W. R. 254. As to the liability of one company to the other, see *Louisville, etc., R. Co. v. East Tennessee, etc., R. Co.*, 60 Fed. R. 993; *Central R., etc., Co. v. Brunswick, etc., Co.*, 87 Ga. 386, s. c. 13 S. E. R. 520.

<sup>1</sup> See *Kellow v. Central, etc., R. Co.*, 68 Iowa 470, s. c. 23 N. W. R. 740, 27 N. W. R. 466; *Richmond, etc., R. Co. v. Greenwood*, 99 Ala. 501, 14 So. R. 495, 500; *Grand Rapids, etc., R. Co. v. Ellison*, 117 Ind. 234, s. c. 20 N. E. R. 135, 39 Am. & Eng. R. Cas. 480; *Flint, etc., R. Co. v. Detroit, etc., R. Co.*, 64 Mich. 350, s. c. 31 N. W. R. 281. But it is not liable if the injury is caused solely by the negligence of the other company. *Bunting v. Pennsylvania*

*R. Co.*, 118 Pa. St. 204, s. c. 12 Atl. R. 448; *Wright v. Midland R. Co.*, 42 L. J. Ex. 89, s. c. 21 W. R. 460, L. R. 8 Ex. 137.

<sup>2</sup> *Farlow v. Kelly*, 108 U. S. 288, s. c. 2 Sup. Ct. R. 555.

<sup>3</sup> *North Chicago, etc., R. Co. v. Williams*, 140 Ill. 275, s. c. 29 N. E. R. 672, 2 Am. Neg. Cas. 684; *Denver, etc., R. Co. v. Dwyer*, 20 Colo. 132, 36 Pac. R. 1106; *Elliott v. Newport, etc., R. Co.*, 18 R. I. 707, 28 Atl. R. 338; *Gray v. Rochester, etc., R. Co.*, 61 Hun 212, s. c. 15 N. Y. Supp. 927; *Carrico v. West Virginia, etc., R. Co.*, 35 W. Va. 389, s. c. 14 S. E. R. 12.

<sup>4</sup> *Jones v. Grand Trunk R. Co.*, 45 U. C. Q. B. 193; *Curtis v. Rochester, etc., R. Co.*, 18 N. Y. 534; *Latch v. Rumner R. Co.*, 27 L. J. Ex. 155, 3 H. & N. (Am. Ed.) 930; *Keeley v. Erie R. Co.*, 47 How. Pr. (N. Y.) 256; *Harris v. Union Pac. R. Co.*, 13 Fed. R. 591.

<sup>5</sup> *Ante*, § 1269.

top of or at the side of cars and yet be perfectly safe so far as passengers inside the car are concerned. In a recent case it was held that, although the tracks of a street railway company were so close together that there was a space of only seventeen inches between passing cars, and the plaintiff while standing on the lateral step of an open car was struck and injured by a passing car on the other track, the railway company was not guilty of negligence.<sup>1</sup> When passengers are injured by obstructions near the track it is usually because they are not where they belong, and they can not recover if the injury is due to their own negligence, no matter whether the company is negligent or not. But there are many cases in which it has been held not to be negligence *per se* to ride on the platform or steps of a street car, especially if it is crowded, and in which passengers so riding have been allowed to recover for injuries received from obstructions near the track or passing vehicles or cars.<sup>2</sup> It is clear, however, that one who hangs on the platform of a dummy car and is injured by thus striking a post, lawfully near the track, of the existence of which he was well aware, is guilty of negligence and can not recover for such injury.<sup>3</sup>

§ 1637. **Ejection of passengers.**—We have elsewhere considered the right of railroad companies to eject travelers for not paying fare or presenting a proper ticket,<sup>4</sup> but we did not consider, in that connection, the right of the company to eject

<sup>1</sup> *Craighead v. Brooklyn City R. Co.*, 123 N. Y. 391, s. c. 25 N. E. R. 387. It was also held that it was not the duty of the company to warn him that he was in a position of danger, especially as past experience seemed to have shown that there was none.

<sup>2</sup> *Clark v. Eighth Ave. R. Co.*, 36 N. Y. 135, s. c. 93 Am. Dec. 495; *Gray v. Rochester, etc., R. Co.*, 61 Hun (N. Y.) 212; *Bruno v. Brooklyn City R. Co.*, 55 N. Y. S. R. 215; *Geitz v. Milwaukee, etc., R. Co.*, 72 Wis. 307; *City R. Co. v. Lee*, 50 N. J. L. 435;

*Topeka, etc., R. Co. v. Higgs*, 38 Kan. 375. But see *Vrooman v. Houston, etc., R. Co.*, 27 N. Y. Supp. 1128; *Carroll v. Interstate, etc., Co.*, 107 Mo. 653, 17 S. W. R. 889; *Chicago, etc., R. Co. v. Scates*, 90 Ill. 586.

<sup>3</sup> *Aikin v. Frankford, etc., R. Co.*, 142 Pa. St. 47, s. c. 21 Atl. R. 781. See, also, *Richmond, etc., R. Co. v. Scott*, 88 Va. 958, s. c. 14 S. E. R. 763; *State v. Lake Roland, etc., R. Co.*, (Md.) 34 Atl. R. 1130.

<sup>4</sup> *Ante*, § 1594, *et seq.* As to ejection of trespassers, see *ante*, § 1255.

disorderly passengers nor the manner of expulsion and the liability of the company where passengers are wrongfully or improperly ejected. It may be stated, as a general rule, that a railroad company may eject all persons who, having a reasonable opportunity, fail to comply with its reasonable regulations or whose presence, because of their misconduct or their having a contagious disease, or the like, is the cause of danger or great inconvenience to the other passengers.<sup>1</sup> Thus, where passengers, after a reasonable opportunity has been afforded, fail to produce a ticket or pay the extra fare demanded on the train, in accordance with the reasonable regulations of the company, they may be expelled.<sup>2</sup> So, where a passenger is so

<sup>1</sup> *New Orleans, etc., R. Co. v. Burke*, 53 Miss. 200; *Chicago, etc., R. Co. v. Flagg*, 43 Ill. 364; *Peck v. New York, etc., R. Co.*, 70 N. Y. 587; *Hutchinson on Carriers*, (2d ed.) §§ 546, 587; 1 *Redfield on Railways*, 91, 92; *McGowen v. Morgan's, etc., R. Co.*, 41 La. Ann. 732, 5 L. R. A. 817, and note; *Gulf, etc., R. Co. v. Moody*, 3 Tex. Civ. App. 622, s. c. 22 S. W. R. 1009; *McMillan v. Federal, etc., R. Co.*, (Pa.) 33 Atl. R. 560. May eject for failure to pay back fare in accordance with regulations. *Manning v. Louisville, etc., R. Co.*, 95 Ala. 392, s. c. 11 So. R. 8, 16 L. R. A. 55, and note. For riding on freight train where ticket is for passenger train. *Thomas v. Chicago, etc., R. Co.*, 72 Mich. 355, s. c. 40 N. W. R. 463; *Hobbs v. Texas, etc., R. Co.*, 49 Ark. 357, s. c. 5 S. W. R. 586. A father can not be expelled on account of the misconduct of an adult son with whom he is traveling. *Louisville, etc., R. Co. v. Maybin*, 66 Miss. 83, s. c. 5 So. R. 401. But compare *Philadelphia, etc., R. Co. v. Hoefflich*, 62 Md. 300, s. c. 50 Am. R. 223, 18 Am. & Eng. R. Cas. 373. As to ejection of one who claims to have a valid pass, see *Chicago, etc., R. Co. v. Herring*, 57 Ill. 59; *Elliott v. Western, etc., R. Co.*, 58 Ga. 454;

*Graham v. Pacific, etc., R. Co.*, 66 Mo. 536. Conductor may remove holder of second-class ticket from first-class car. *Alabama, etc., R. Co. v. Drummond*, (Miss.) 20 So. R. 7; *New York, etc., R. Co. v. Bennett*, 50 Fed. R. 496. But compare *Louisville, etc., R. Co. v. Gaines*, (Ky.) 36 S. W. R. 174.

<sup>2</sup> *State v. Goold*, 53 Me. 279; *Curl v. Chicago, etc., R. Co.*, 63 Iowa 417; *International, etc., R. Co. v. Wilkes*, 68 Tex. 617, s. c. 34 Am. & Eng. R. Cas. 331; *Russell v. Missouri, etc., R. Co.*, (Tex. Civ. App.) 35 S. W. R. 724; *Baltimore, etc., R. Co. v. Blocher*, 27 Md. 277; *Post v. Chicago, etc., R. Co.*, 14 Neb. 110; *Peabody v. Oregon, etc., Co.*, 21 Ore. 121, s. c. 12 L. R. A. 823, and note; *Grogan v. Chesapeake, etc., R. Co.*, 39 W. Va. 415, s. c. 19 S. E. R. 562; *Cox v. Los Angeles, etc., R. Co.*, 109 Cal. 100, s. c. 41 Pac. R. 794; *White v. Grand Rapids, etc., R. Co.*, (Mich.) 65 N. W. R. 521; *Wiggins v. King*, 36 N. Y. Supp. 768; *Atchison, etc., R. Co. v. Brown*, 2 Kan. App. 604, 42 Pac. R. 588; *Scott v. Cleveland, etc., R. Co.*, (Ind.) 43 N. E. R. 133; *Williams v. Mobile, etc., R. Co.* (Miss.) 19 So. R. 90; *Church v. Chicago, etc., R. Co.*, (S. Dak.) 60 N. W. R. 854; *Atchison, etc., R. Co.*

drunk<sup>1</sup> or disorderly<sup>2</sup> as to seriously inconvenience or endanger the other passengers, or is afflicted with a contagious disease,<sup>3</sup> he may be ejected. According to the weight of authority and the better reason, a passenger who has persistently refused to pay his fare or produce a ticket can not gain a right to be carried and make the expulsion unlawful by a tender of the fare after the conductor has begun to expel him;<sup>4</sup> but it has been

*v. Gants*, 38 Kan. 608, s. c. 34 Am. & Eng. R. Cas. 290; *Memphis, etc., R. Co. v. Benson*, 85 Tenn. 627, s. c. 31 Am. & Eng. R. 112; *Swan v. Manchester, etc., R. Co.*, 132 Mass. 116, s. c. 42 Am. R. 432. Indeed, we have elsewhere shown, many authorities hold that even if the passenger has been misled by a ticket agent, or has not had a reasonable opportunity to purchase a ticket, he should pay his fare and then sue the company, and that he can not sue for the ejection when the conductor acts in accordance with the reasonable regulations of the company, and the passenger refuses to pay the fare and has no ticket apparently good on its face.

<sup>1</sup> *McClelland v. Louisville, etc., R. Co.*, 94 Ind. 276, s. c. 18 Am. & Eng. R. Cas. 260; *Baltimore, etc., R. Co. v. McDonald*, 68 Ind. 316; *Murphy v. Union R. Co.*, 118 Mass. 228; *Lemont v. Washington, etc., R. Co.*, 1 Mackey (D. C.) 180, s. c. 1 Am. & Eng. R. Cas. 263; *Haley v. Chicago, etc., R. Co.*, 21 Iowa 15; *Louisville, etc., R. Co. v. Sullivan*, 81 Ky. 624. But see *Putnam v. Broadway R. Co.*, 55 N. Y. 108.

<sup>2</sup> *Vinton v. Middlesex R. Co.*, 11 Allen (Mass.) 304; *Sullivan v. Old Colony, etc., R. Co.*, 148 Mass. 119, s. c. 1 L. R. A. 513, and note; *Chicago, etc., R. Co. v. Griffin*, 68 Ill. 499; *Murphy v. Western, etc., R. Co.*, 23 Fed. R. 637; *Peavy v. Georgia, etc., R. Co.*, 81 Ga. 485, s. c. 37 Am. & Eng. R. Cas. 114; *Philadelphia, etc., R. Co. v. Larkin*,

47 Md. 155; *Thurston v. Union Pac. R. Co.*, 4 Dill. (U. S. C. C.) 321; *Robinson v. Rockland, etc., R. Co.*, 87 Me. 387, s. c. 32 Atl. R. 994. But see *Chicago City R. Co. v. Pelletier*, 134 Ill. 120, s. c. 24 N. E. R. 770; *Brown v. Memphis, etc., R. Co.*, 7 Fed. R. 51.

<sup>3</sup> *Paddock v. Atchison, etc., R. Co.*, 37 Fed. R. 841; *Atchison, etc., R. Co. v. Weber*, 33 Kan. 543, 52 Am. R. 543, s. c. 21 Am. & Eng. R. Cas. 418. As to when an insane person may be ejected, although his conduct is not such as to indicate danger, see *Meyer v. St. Louis, etc. R. Co.*, 54 Fed. R. 116.

<sup>4</sup> *Atchison, etc., R. Co. v. Dewelle*, 44 Kan. 394, s. c. 44 Am. & Eng. R. Cas. 402; *Stone v. Chicago, etc., R. Co.*, 47 Iowa 82, s. c. 29 Am. R. 458; *O'Brien v. Boston, etc., R. Co.*, 15 Gray (Mass.) 20; *Marshall v. Boston, etc., R. Co.*, 145 Mass. 164, s. c. 31 Am. & Eng. R. Cas. 18; *Cincinnati, etc., R. Co. v. Skillman*, 39 Ohio St. 444, s. c. 13 Am. & Eng. R. Cas. 31; *State v. Campbell*, 32 N. J. L. 309; *Pease v. Delaware, etc., R. Co.*, 101 N. Y. 367; *Hoffbauer v. Davenport, etc., R. Co.*, 52 Iowa 342; *Georgia, etc., R. Co. v. Asmore*, 88 Ga. 529, s. c. 15 S. E. R. 13, 16 L. R. A. 53, and note; *Pickens v. Richmond, etc., R. Co.*, 104 N. Car. 312; *Harrison v. Fink*, 42 Fed. R. 787; *Thomas v. Geldart*, 20 New Bruns. 95. *Contra*, *O'Brien v. New York, etc., R. Co.*, 80 N. Y. 236; *Wardwell v. Chicago, etc., R. Co.*, 46

held that if he has no money another may pay his fare for him before he is expelled.<sup>1</sup> The company must exercise its right to eject passengers in a lawful manner and with some regard to their safety. Excessive and unnecessary force must not be used.<sup>2</sup> So, if a passenger is injured by being ejected while the car is in motion, or in a dangerous and improper place, where he is exposed to unnecessary peril, the railroad company may be held liable for such injury.<sup>3</sup> If he is so intoxicated or so young or feeble as not to be able to take care of himself or

Minn. 514, s. c. 49 N. W. R. 206; Louisville, etc., R. Co. v. Harris, 9 Lea (Tenn.) 180, s. c. 16 Am. & Eng. R. Cas. 374; Gould v. Chicago, etc., R. Co., 18 Fed. R. 155; Texas, etc., R. Co. v. Bond, 62 Tex. 442, s. c. 50 Am. R. 532; Bland v. Southern, etc., R. Co., 55 Cal. 570, s. c. 36 Am. R. 50. In most of these cases, however, the circumstances were peculiar or the refusal was not willful. See, also, Chicago, etc., R. Co. v. Bryan, 90 Ill. 126; Louisville, etc., R. Co. v. Breckinridge, (Ky.) 34 S. W. R. 702.

<sup>1</sup> Louisville, etc., R. Co. v. Garrett, 8 Lea (Tenn.) 438, s. c. 3 Am. & Eng. R. Cas. 416. See, also, Clark v. Wilmington, etc., R. Co., 91 N. Car. 506; Hoffbauer v. Davenport, etc., R. Co., 52 Iowa 342; O'Brien v. New York, etc., R. Co., 80 N. Y. 236; South Carolina R. Co. v. Nix, 68 Ga. 572.

<sup>2</sup> New Jersey, etc., R. Co. v. Brockett, 121 U. S. 637, s. c. 7 Sup. Ct. R. 1039; Jardine v. Cornell, 50 N. J. L. 485, s. c. 14 Atl. R. 590; Jackson v. Second Ave. R. Co., 47 N. Y. 274; New York, etc., R. Co. v. Haring, 47 N. J. L. 137, s. c. 21 Am. & Eng. R. Cas. 436; Chicago, etc., R. Co. v. Bills, 118 Ind. 221, s. c. 37 Am. & Eng. R. Cas. 121, and note; Citizens' St. R. Co. v. Willoebey, 134 Ind. 563, s. c. 33 N. E. R. 627; Brown v. Hannibal, etc., R. Co., 66 Mo. 588; Wright v. California Cent. R. Co., 78

Cal. 360, s. c. 20 Pac. R. 740; Knowles v. Norfolk, etc., R. Co., 102 N. Car. 59; Gulf, etc., R. Co. v. Kuenhle, 4 Tex. App. (Civ. Cas.) 427, s. c. 16 S. W. R. 177; Marquette v. Chicago, etc., R. Co., 33 Iowa 562; Bass v. Chicago, etc., R. Co., 39 Wis. 636; *ante*, § 1255.

<sup>3</sup> Sanford v. Eight Ave. R. Co., 23 N. Y. 343, s. c. 80 Am. Dec. 286; Kansas City R. Co. v. Kelly, 36 Kan. 655; Gallena v. Hot Springs, etc., R. Co., 13 Fed. R. 116; Holmes v. Wakefield, 12 Allen (Mass.) 580; Railway Co. v. Valleley, 32 Ohio St. 345, s. c. 30 Am. R. 601; Healey v. City, etc., R. Co., 28 Ohio St. 23; Atchison, etc., R. Co. v. Weber, 33 Kan. 543, s. c. 21 Am. & Eng. R. Cas. 418; Hall v. South Carolina, etc., R. Co., 28 S. Car. 261, s. c. 34 Am. & Eng. R. Cas. 311; Kline v. Central Pac. R. Co., 37 Cal. 400; Wyman v. Northern Pac. R. Co., 34 Minn. 210; Ham v. Delaware, etc., R. Co., 142 Pa. St. 617, s. c. 21 Atl. R. 1012; Arnold v. Pennsylvania R. Co., 115 Pa. St. 135; Vicksburg, etc., R. Co. v. Phillips, 64 Miss. 693, s. c. 30 Am. & Eng. R. Cas. 587; State v. Kinney, 34 Minn. 311; Gulf, etc., R. Co. v. Kirkbride, 79 Tex. 457, s. c. 15 S. W. R. 495; Fell v. Northern Pac. R. Co., 44 Fed. R. 248; Southern Kan. R. Co. v. Rice, 38 Kan. 398, s. c. 16 Pac. R. 817. But compare Southern, etc., R. Co. v. Sanford, 45 Kans. 372, s. c. 25 Pac. R. 891.

look out for his own safety, the company should exercise reasonable care to see to it that he is not expelled and abandoned in such a place and under such circumstances that he will be exposed to unnecessary peril.<sup>1</sup> In some states it is provided by statute that a passenger can be lawfully ejected only at a station or usual stopping place, and this has been held to be the law in some jurisdictions, even in the absence of such a statute;<sup>2</sup> but the better rule is that, if there is no such statute, one whom the company has a right to eject may be expelled between stations as well as at a station.<sup>3</sup> We have elsewhere considered the liabil-

<sup>1</sup> *Louisville, etc., R. Co. v. Ellis'* Admx., (Ky.) 30 S. W. R. 979; *Louisville, etc., R. Co. v. Sullivan*, 81 Ky. 624, s. c. 16 Am. & Eng. R. Cas. 390, 50 Am. R. 186; *Conolly v. Crescent City R. Co.*, 41 La. Ann. 57; *Johnson v. Louisville, etc., R. Co.*, 104 Ala. 241, s. c. 16 So. R. 75; *Louisville, etc., R. Co. v. Johnson*, (Ala.) 19 So. R. 51; *Texas, etc., R. Co. v. McDonald*, 2 Tex. App. (Civ. Cas.) 144. See, also, *Cincinnati, etc., R. Co. v. Cooper*, 120 Ind. 469, s. c. 22 N. E. R. 340; *Indianapolis, etc., R. Co. v. Pitzer*, 109 Ind. 179; *Atchison, etc., R. Co. v. Weber*, 33 Kan. 543, s. c. 52 Am. R. 543; *Cincinnati, etc., R. Co. v. Kasen*, 49 Ohio St. 230, s. c. 16 L. R. A. 674; *Guy v. New York, etc., R. Co.*, 30 Hun (N. Y.) 399; *Illinois Cent. R. Co. v. Sutton*, 53 Ill. 397. But compare *Roseman v. Carolina Cent. R. Co.*, 112 N. Car. 709, s. c. 16 S. E. R. 766, 19 L. R. A. 327; *Haley v. Chicago, etc., R. Co.*, 21 Iowa 15; *McClelland v. Louisville, etc., R. Co.*, 94 Ind. 276; *Louisville, etc., R. Co. v. Johnson*, 92 Ala. 204, s. c. 9 So. R. 269; *Louisville, etc., R. Co. v. Hawkins*, 92 Ala. 241, s. c. 9 So. R. 271; *Louisville, etc., R. Co. v. Logan*, 88 Ky. 232, s. c. 3 L. R. A. 80; *Missouri Pac. R. Co. v. Evans*, 71 Tex. 361, s. c. 1 L. R. A. 476; *Railway Co. v. Val-*

*ley*, 32 Ohio St. 345, 30 Am. R. 601. These latter cases are not in conflict with the rule as we have stated it. They hold, and correctly, as we think, that if the passenger does not appear too drunk to take care of himself, or if his ejection in that state is not a proximate cause of his subsequent injury, or where he is put off at a proper place and wanders back on the track, or the like, the company is not liable.

<sup>2</sup> *Boehm v. Duluth, etc., R. Co.*, 81 Wis. 592, s. c. 65 N. W. R. 506, (holding that a statute authorized ejection of a passenger at a station or usual stopping place or near a dwelling impliedly forbids it at any other place); *Illinois Cent. R. Co. v. Latimer*, 128 Ill. 163, s. c. 21 N. E. R. 7; *Texas, etc., R. Co. v. Casey*, 52 Tex. 112; *Stephen v. Smith*, 29 Vt. 160; *St. Louis, etc., R. Co. v. Branch*, 45 Ark. 524; *South Florida R. Co. v. Rhodes*, 25 Fla. 40.

<sup>3</sup> *Scott v. Cleveland, etc., R. Co.*, (Ind.) 43 N. E. R. 133; *Jeffersonville R. Co. v. Rogers*, 28 Ind. 1, 38 Ind. 116; *Moore v. Columbia, etc., R. Co.*, 38 S. Car. 1, s. c. 16 S. E. R. 781; *Great Western, etc., R. Co. v. Miller*, 19 Mich. 305; *Brown v. Chicago, etc., R. Co.*, 51 Iowa 235; *Rudy v. Rio Grande, etc., R. Co.*, 8 Utah 165, s. c. 30 Pac. R. 366; *Magee v. Oregon, etc.,*

ity of railroad companies for the wrongful acts of their employes, whether willful or otherwise,<sup>1</sup> and little remains to be said upon the subject in this connection. There is, however, it may be well to state, considerable conflict among the authorities as to whether a passenger may resist a wrongful attempt to eject him and the effect of such resistance upon the liability of the company. It is clear, we think, that a passenger has a right to resist an attempt to eject him from a rapidly moving train or under other circumstances where it will endanger his life,<sup>2</sup> but it is equally clear that if he is in the wrong and is sought to be expelled in a proper manner he can not recover for injuries invited by his resistance and caused by the exercise of reasonably necessary force to overcome that resistance.<sup>3</sup> If he is in the right some of the courts hold that he may resist expulsion and recover additional damages for injuries inflicted by the conductor in using force necessary to overcome his re-

Co., 46 Fed. R. 734; *Burch v. Baltimore, etc., R. Co.*, 3 App. Cas. (D. C.) 346, 26 L. R. A. 129, and note, where authorities on both sides are collected; *O'Brien v. Boston, etc., R. Co.*, 15 Gray (Mass.) 20, s. c. 77 Am. Dec. 347; *McClure v. Philadelphia, etc., R. Co.*, 34 Md. 532, s. c. 6 Am. R. 345; *Illinois, etc., R. Co. v. Whittemore*, 43 Ill. 420; *Wyman v. Northern R. Co.*, 34 Minn. 210; *Cincinnati, etc., R. Co. v. Skillman*, 39 Ohio St. 444.

<sup>1</sup> See *ante*, § 1265; *post*, § 1638. See, also, as to willful or wrongful ejection of a passenger by employes. *Terre Haute, etc., R. Co. v. Fitzgerald*, 47 Ind. 79; *Kline v. Central Pac. R. Co.*, 37 Cal. 400; *Louisville, etc., R. Co. v. Whitman*, 79 Ala. 328; *Perkins v. Missouri, etc., R. Co.*, 55 Mo. 201; *Hoffman v. New York, etc., R. Co.*, 87 N. Y. 25, s. c. 41 Am. R. 337; *Eads v. Metropolitan, etc., R. Co.*, 43 Mo. App. 536; *Great Western, etc., R. Co. v. Miller*, 19 Mich. 305; *Ramsden v. Boston, etc., R. Co.*, 104 Mass. 117; *Pennsylvania R. Co. v. Vandiver*, 42 Pa. St. 365;

*Moore v. Fitchburg, etc., R. Co.*, 4 Gray (Mass.) 465; *Chicago, etc., R. Co. v. Bryan*, 90 Ill. 126; *Philadelphia, etc., R. Co. v. Derby*, 14 How. (U. S.) 468. But compare *Pennsylvania Co. v. Toomey*, 91 Pa. St. 256, s. c. 1 Am. & Eng. R. Cas. 461.

<sup>2</sup> *Sanford v. Eighth Ave. R. Co.*, 23 N. Y. 343, s. c. 80 Am. Dec. 286; *English v. Delaware, etc., R. Co.*, 66 N. Y. 454; *Southern Kan. R. Co. v. Rice*, 38 Kan. 398, s. c. 16 Pac. R. 817. In such a case it is reasonable to hold that he may recover all damages sustained, although more force is used on account of his resistance.

<sup>3</sup> *Chicago, etc., R. Co. v. Wilson*, 23 Ill. App. 63; *Chicago, etc., R. Co. v. Willard*, 31 Ill. App. 435; *Moore v. Columbia, etc., R. Co.*, 38 S. Car. 1, 16 S. E. R. 781, s. c. 58 Am. & Eng. R. Cas. 493; *Peavy v. Georgia, etc., R. Co.*, 81 Ga. 485, 8 S. E. R. 70, s. c. 37 Am. & Eng. R. Cas. 114; *Townsend v. New York, etc., R. Co.*, 56 N. Y. 295; *Murphy v. Union R. Co.*, 118 Mass. 228.

sistance,<sup>1</sup> but other courts hold that such resistance should not be encouraged and that he can recover no damages for increased injuries received on that account in addition to what he would otherwise have been entitled to recover.<sup>2</sup> One who enters a car expecting and desiring to be ejected in order that he may sue the company for damages can not recover for wounded feelings or pain of mind on being ejected.<sup>3</sup>

§ 1638. **Assaults and injuries by employees.**—It is well settled that railroad companies are liable not only for injuries to their passengers, who are without fault, by the negligent acts of their employes, but also for injuries willfully inflicted upon such passengers by their employes within the scope or line of their duty while engaged in executing the contract of carriage.<sup>4</sup> But if the terms “scope of their employment” or “line of their duty” are used in their narrowest sense, and this is the full

<sup>1</sup> Louisville, etc., R. Co. v. Wolfe, 128 Ind. 347, s. c. 27 N. E. R. 606, 47 Am. & Eng. R. Cas. 630; United States v. Kane, 9 Sawy. (U. S. C. C.) 614. See, also, New York, etc., R. Co. v. Winter, 143 U. S. 60, s. c. 12 Sup. Ct. R. 356; Pittsburgh, etc., R. Co. v. Russ, 57 Fed. R. 822; Lake Erie, etc., R. Co. v. Acres, 108 Ind. 548, s. c. 28 Am. & Eng. R. Cas. 112; Chicago, etc., R. Co. v. Holdridge, 118 Ind. 281.

<sup>2</sup> Brown v. Memphis, etc., R. Co., 7 Fed. R. 51, s. c. 1 Am. & Eng. R. Cas. 247; Hufford v. Grand Rapids, etc., R. Co., 53 Mich. 118, s. c. 18 N. W. R. 580; Pennsylvania R. Co. v. Connell, 112 Ill. 295; Hall v. Memphis, etc., R. Co., 15 Fed. R. 57. See, also, Southern Kan. R. Co. v. Rice, 38 Kan. 398, s. c. 34 Am. & Eng. R. Cas. 316, 320; Chicago, etc., R. Co. v. Griffin, 68 Ill. 499; Peabody v. Oregon, etc., R. Co., 21 Ore. 121, s. c. 26 Pac. R. 1053.

<sup>3</sup> Railway Co. v. Trimble, 54 Ark. 354, s. c. 15 S. W. R. 899; Cincinnati, etc., R. Co. v. Cole, 29 Ohio St. 126.

<sup>4</sup> New Jersey Steamboat Co. v. Brockett, 121 U. S. 637, s. c. 7 Sup. Ct. R. 1039, 1041; Jeffersonville, etc., R. Co. v. Rogers, 38 Ind. 116; Louisville, etc., R. Co. v. Wood, 113 Ind. 544; American Express Co. v. Patterson, 73 Ind. 430; Milwaukee, etc., R. Co. v. Finney, 10 Wis. 388; Moore v. Fitchburg R. Co., 4 Gray (Mass.) 465; Weed v. Panama, etc., R. Co., 17 N. Y. 362; Pennsylvania R. Co. v. Vandiver, 42 Pa. St. 365; Bryant v. Rich, 106 Mass. 108, s. c. 8 Am. R. 311; Ramsden v. Boston, etc., R. Co., 104 Mass. 117, s. c. 6 Am. R. 200; North Chicago, R. Co. v. Gastka, 128 Ill. 613; Western, etc., R. Co. v. Turner, 72 Ga. 292; Chamberlain v. Chandler, 3 Mason (U. S. C. C.) 242; Wabash R. Co. v. Savage, 110 Ind. 156, s. c. 9 N. E. R. 85, and authorities cited on page 87; Harrold v. Winona, etc., R. Co., 47 Minn. 17, s. c. 49 N. W. R. 389; Palmeri v. Manhattan R. Co., 133 N. Y. 261, s. c. 28 Am. St. R. 632, and note.



measure and limit of their liability in such cases it would seem that, so far as the willful acts of their employes are concerned, their duty and liability to their passengers are not, practically, appreciably greater than they are to licensees or even mere trespassers, and that it would be fully as difficult for a passenger to recover damages from the company when assaulted by one of its employes as when assaulted by a fellow passenger or a stranger upon the train. On the other hand, if a railroad company is to be held liable for a willful injury to a passenger by a servant outside the scope of his authority, and at all events, it may be plausibly argued that this would make it an insurer of the perfection of its employes, and render it liable for what it could not be deemed to have even impliedly authorized. There is much apparent conflict among the authorities upon this subject, but we think some of it is due to the use of the term "scope of employment" or "line of duty" in a different sense in different cases, or to a failure to place the decision upon the correct ground. It is not merely a question of negligence in such cases, nor is it strictly a question depending upon the scope of the servant's particular employment. It is a question of the absolute duty of a railroad company to its passengers as long as that relation subsists, and a breach of that duty on its part whether caused by the willful act of an employe or not. A carrier is bound to discharge the implied duty, arising out of its contract and imposed by law, that its passengers shall be protected from injury by its servants and shall not be willfully insulted and harmed by them, and if it commits the discharge of this duty to an employe it may well be held to do so at its peril, notwithstanding the exercise of care on its part in selecting its servants. Either the company or the passengers must take the risk of infirmities of temper, maliciousness and misconduct of the employes whom the company has placed upon the train and to whom it has committed the discharge of its duty to protect and look after the safety of its passengers. A passenger has no control over them, and the company alone has the power to select and remove them. It is, therefore, but just to make the company, rather than the passengers, take

this risk, and to hold it responsible. This leads us to the conclusion that a railroad company is liable for an injury willfully inflicted upon a passenger by its employes while engaged in performing a duty which the carrier owes to the passenger, or in executing the contract, although the company is guilty of no negligence in selecting them and such act was not strictly within the scope of their employment or line of their duty in the sense that it was done for the carrier or arose out of the performance of their particular duty.<sup>1</sup> In a broader sense, however, it may be said that it is within the scope of their em-

<sup>1</sup> *Goddard v. Grand Trunk R. Co.*, 57 Me. 202, s. c. 2 Am. R. 39; *Chicago, etc., R. Co. v. Flexman*, 103 Ill. 546, s. c. 42 Am. R. 33; *Stewart v. Brooklyn, etc., R. Co.*, 90 N. Y. 588, s. c. 43 Am. R. 185; *Smith v. Manhattan R. Co.*, 18 N. Y. Supp. 759; *Landreaux v. Bell*, 5 La. (O. S.) 434; *Hanson v. European, etc., R. Co.*, 62 Me. 84; *Savannah, etc., R. Co. v. Bryan*, 86 Ga. 312, s. c. 12 S. E. R. 307; *Winnegar's Admr. v. Central Pass. R. Co.*, 85 Ky. 547, s. c. 4 S. W. R. 237; *Wise v. South Covington, etc., R. Co.*, (Ky.) 34 S. W. R. 894; *Dillingham v. Anthony*, 73 Tex. 47, s. c. 11 S. W. R. 139; *Sherley v. Billings*, 8 Bush (Ky.) 147; *Pendleton v. Kinsley*, 3 Cliff. (U. S. C. C.) 416; *Eads v. Metropolitan R. Co.*, 43 Mo. App. 536; *Williams v. Pullman, etc., Co.*, 40 La. Ann. 87, s. c. 3 S. W. R. 631; *Springer Transp. Co. v. Smith*, 16 Lea (Tenn.) 498, s. c. 1 S. W. R. 280; *Baltimore, etc., R. Co. v. Barger*, 80 Md. 23, s. c. 26 L. R. A. 220; *New Orleans, etc., R. Co. v. Jones*, 142 U. S. 18, s. c. 12 Sup. Ct. R. 109, 112; *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, s. c. 14 L. R. A. 798, 29 Am. St. R. 827; *Indianapolis, etc., R. Co. v. Cooper*, 6 Ind. App. 202, s. c. 33 N. E. R. 219; 2 Wood on Railroads, 1371, *et seq.*; 3 Wood on Railroads, 1684, 1685; *Taylor on Priv. Corp.*, (3d ed.) § 347; note to *Ware v.*

*Barataria, etc., Co.*, 15 La. 169, 35 Am. Dec. 189, 201 (citing *McKinley v. Chicago, etc., R. Co.*, 44 Iowa 314, s. c. 24 Am. R. 748; *Bass v. Chicago, etc., R. Co.*, 42 Wis. 654, s. c. 24 Am. R. 437; *Philadelphia, etc., R. Co. v. Derby*, 14 How. (U.S.) 468; *Baltimore, etc., R. Co. v. Blocher*, 27 Md. 277; *Healey v. City etc., R. Co.*, 28 Ohio St. 23, and other cases); note to *Richmond, etc., R. Co. v. Jefferson*, 32 Am. St. R. 87, 95. We can best show the distinction we have attempted to draw by an illustration. Suppose a conductor, in ejecting a passenger for good cause should maliciously use unnecessary force, or should strike or abuse him in an altercation over the sufficiency of a ticket which the passenger had presented. In such a case the conductor would be acting within the scope of his employment or in the line of his duty in the narrowest sense. But suppose two passengers should be quietly discussing politics and the conductor, hearing them, should take issue with one of them and willfully assault him because they disagreed upon that subject. In such a case the conductor would not be acting within the scope of his employment or line of his duty in the narrowest sense, yet, we think the railroad company would clearly be liable under the authorities we have cited.

ployment or line of their duty, for employes, especially conductors and brakemen, to themselves refrain from willfully injuring passengers, and some courts have therefore held the company liable upon the ground that employes to whom the carrier entrusts the performance of its duty to passengers continue in the line of their employment until their relation as servants of the master is dissolved, and that, while the specified duty of an employe in such a case may be very limited, "the scope of the employment is as broad as the obligation the master has assumed."<sup>1</sup> There are expressions in many cases to the effect that the act, in order to render the company liable, must be within the "scope of the employment" or the "line of the employe's duty," but from the conclusion reached in nearly all of such cases we think it clear that the court used these terms in their broadest sense, as explained in the first case cited in the last note, and did not intend to apply the same rule to passengers as to strangers and to limit the liability of the company to cases in which the employe was acting in furtherance of the master's business, or in the line of his duty in such a sense that the master might be deemed to have authorized it, nor to cases in which the company was negligent in employing the servant.<sup>2</sup> The rule we approve is, however, denied by

<sup>1</sup> See, for instance, *Larkin v. Oregon*, Ind. 79; *Indianapolis, etc., R. Co. v. Anthony*, 43 Ind. 183; *Pittsburgh, etc., R. Co. v. Theobald*, 51 Ind. 246; *New Jersey, etc., Co. v. Brockett*, 121 U. S. 637, s. c. 7 Sup. Ct. R. 1039.

<sup>2</sup> For cases in which it is said, or intimated that the act must be within the line of the servant's duty or scope of his employment, but in which these terms were evidently used in the sense indicated in the text, see *Louisville, etc., R. Co. v. Kelly*, 92 Ind. 371; *Smith v. Louisville, etc., R. Co.*, 124 Ind. 394; *Mulligan v. New York, etc., R. Co.*, 129 N. Y. 506, s. c. 29 N. E. R. 952, 53 Am. & Eng. R. Cas. 47; *Heenrich v. Pullman, etc., Co.*, 20 Fed. R. 100, s. c. 18 Am. & Eng. R. Cas. 379; *Ramsden v. Boston, etc., R. Co.*, 104

*etc., R. Co.*, 15 Ore. 220; *Great Western R. Co. v. Miller*, 19 Mich. 305. See, also, *Western, etc., R. Co. v. Turner*, 72 Ga. 292, s. c. 53 Am. R. 842; *Hinckley v. Chicago, etc., R. Co.*, 38 Wis. 194; *Belknap v. Boston, etc., R. Co.*, 49 N. H. 358; *Malecek v. Tower Grove, etc., R. Co.*, 57 Mo. 17; *Passenger R. Co. v. Young*, 21 Ohio St. 518, s. c. 8 Am. R. 78; *Rounds v. Delaware, etc., R. Co.*, 64 N. Y. 129; *Coleman v. New York, etc., R. Co.*, 106 Mass. 160; *Chicago, etc., R. Co. v. Williams*, 55 Ill. 185, s. c. 8 Am. R. 641; *Dwinelle v. New York, etc., R. Co.*, 120 N. Y. 117, s. c. 17 Am. St. R. 611; *Conger v. St. Paul, etc., R. Co.*, 45 Minn. 207; *Terre Haute, etc., R. Co. v. Fitzgerald*, 47

some courts and text writers, who maintain that a railroad company is not an insurer against the willful assaults of its employes any more than it is an insurer of their safety in other matters; that it is liable only for negligence, and that it is not negligence when a servant who has been carefully selected, but is nevertheless human and mortal, "does that in the exercise of his own volition and to serve his own purposes, which the railway has not expressly nor impliedly authorized him to do in its behalf."<sup>1</sup> Under the rule which we have approved railroad companies have been held liable where a brakeman, although not authorized to clean out cars, willfully drenched a passenger with water while so doing,<sup>2</sup> where the conductor forcibly kissed a female passenger,<sup>3</sup> where a brakeman, accused of theft by a passenger, struck him in the face,<sup>4</sup> for insulting

Mass. 117; *Johnson v. Chicago, etc., R. Co.*, 58 Iowa 348, s. c. 8 Am. & Eng. R. 206; *Fick v. Chicago, etc., R. Co.*, 68 Wis. 469, s. c. 34 Am. & Eng. R. Cas. 378 (holding that assault by ticket agent was within scope of his employment, notwithstanding finding of jury to contrary); *Louisville, etc., R. Co. v. Kendall*, 138 Ind. 313, s. c. 36 N. E. R. 415, and cases cited in last preceding note.

<sup>1</sup> *Patterson's Ry. Acc. Law*, 112, 117; *Hutchinson on Carriers*, (2d ed.) §§ 599, 600; *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110; *Isaacs v. Third Ave. R. Co.*, 47 N. Y. 122, (limited in other New York cases); *Poulton v. London, etc., R. Co.*, L. R. 2 Q. B. 534; *Louisville, etc., R. Co. v. Douglass*, 69 Miss. 723, 11 So. R. 933; *McKeon v. Citizens' R. Co.*, 42 Mo. 79 (overruled in *Spohn v. Missouri, etc., R. Co.*, 87 Mo. 74, 101 Mo. 417); *Evansville, etc., R. Co. v. Baum*, 26 Ind. 70. Mr. Patterson says the company will be liable, however, if it subsequently ratifies the act. *Patterson's Ry. Acc. Law*, 113, citing *Bass v. Chicago, etc., R. Co.*, 39 Wis. 636; *Gasway v. Atlanta, etc., R.*

*Co.*, 58 Ga. 216. But it seems to us that he is hardly consistent in this, the act not being for the benefit of the company nor in furtherance of its business in any way. See *Dillingham v. Russell*, 73 Tex. 47, s. c. 15 Am. St. R. 753; *Eastern, etc., R. Co. v. Broom*, 6 Exch. 314, s. c. 15 Jur. 297; *Goff v. Great Northern R. Co.*, 3 El. & El. 672, s. c. 30 L. J. Q. B. 148; *Cooley on Torts*, 127.

<sup>2</sup> *Terre Haute, etc., R. Co. v. Jackson*, 81 Ind. 19.

<sup>3</sup> *Craker v. Chicago, etc., R. Co.*, 36 Wis. 657, s. c. 17 Am. R. 504. So, in other cases of indecent assaults upon female passengers or improper conduct towards them by a conductor or other employe in charge. *Louisville, etc., R. Co. v. Ballard*, 85 Ky. 307; *Campbell v. Pullman, etc., Car Co.*, 42 Fed. R. 484; *Nieto v. Clark*, 1 Cliff. (U. S. C. C.) 145; *St. Louis, etc., R. Co. v. Griffith*, (Tex. Civ. App.) 35 S. W. R. 741.

<sup>4</sup> *Chicago, etc., R. Co. v. Flexman*, 103 Ill. 546, s. c. 8 Am. & Eng. R. Cas. 354.

and abusive language wrongfully used by a conductor or street car driver,<sup>1</sup> and, in some cases, for assaults by its employes even where the passenger was not upon the train, but the relation of carrier and passenger nevertheless existed at the time,<sup>2</sup> as, for instance, where a railroad gate-keeper assaulted a passenger who was on his way to the train.<sup>3</sup> On the other hand, it has been held that a railroad company is not liable for an assault with a hatchet upon a passenger by a baggage master growing out of a personal altercation,<sup>4</sup> nor for an assault by its driver upon a passenger after he had left the car and was on the way to report the driver to the superintendent of the company.<sup>5</sup> The company is not liable where the passenger is in fault and brings the injury upon himself, as for instance, where he wrongfully provokes and renders it apparently necessary,<sup>6</sup> or is rightfully ejected by the use of no more force than is necessary. Nor is it liable if he is injured by pure accident, as, for instance, where an employe accidentally slips and falls against him.<sup>7</sup>

<sup>1</sup> *Bryan v. Chicago, etc., R. Co.*, 63 Iowa 464, s. c. 16 Am. & Eng. R. Cas. 335; *Lafitte v. New Orleans, etc., R. Co.*, 43 La. Ann. 34, s. c. 8 So. R. 701, 12 L. R. A. 337; *Wise v. South Covington, etc., R. Co.*, (Ky.) 34 S. W. R. 894; *Richberger v. American Exp. Co.*, (Miss.) 31 L. R. A. 390; *Atlanta, etc., R. Co. v. Condor*, 75 Ga. 51.

<sup>2</sup> *Peeples v. Brunswick, etc., R. Co.*, 60 Ga. 281; *Wise v. South Covington, etc., R. Co.*, (Ky.) 34 S. W. R. 894; *Fick v. Chicago, etc., R. Co.*, 68 Wis. 469; *Smith v. Southeastern R. Co.*, 39 L. J. C. P. 346; *McKinley v. Chicago, etc., R. Co.*, 44 Iowa 314; *Walker v. Southeastern R. Co.*, 39 L. J. C. P. 346.

<sup>3</sup> *Indianapolis, etc., R. Co. v. Cooper*, 6 Ind. App. 202, s. c. 33 N. E. R. 219; *Dickerman v. St. Paul, etc., Co.*, 44 Minn. 433, s. c. 45 Am. & Eng. R. Cas. 596. But compare *Priest v. Hudson River R. Co.*, 65 N. Y. 589.

<sup>4</sup> *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110.

<sup>5</sup> *Central R. Co. v. Peacock*, 69 Md. 257. This, however, was decided upon the theory that the relation of carrier and passenger had ceased. But in *Savannah, etc., R. Co. v. Bryan*, 86 Ga. 312, s. c. 12 S. E. R. 307, it was held that the company was liable under a similar state of facts.

<sup>6</sup> *Scott v. Central, etc., R. Co.*, 53 Hun (N. Y.) 414, s. c. 6 N. Y. Supp. 382; *Flynn v. Central Park, etc., R. Co.*, 49 N. Y. Super. Ct. 81; *Ricketts v. Chesapeake, etc., R. Co.*, 33 W. Va. 433; *Harrison v. Fink*, 42 Fed. R. 787; *New Orleans, etc., R. Co. v. Jopes*, 142 U. S. 18, s. c. 12 Sup. Ct. R. 109. But see *Chicago, etc., R. Co. v. Flexman*, 103 Ill. 546; *Haman v. Omaha, etc., R. Co.*, 35 Neb. 74, 52 N. W. R. 830.

<sup>7</sup> *Skinner v. Atchison, etc., R. Co.*, 39 Fed. R. 188.

§ 1639. **Injuries caused by other passengers and third persons.**—Although railroad companies are not, perhaps, bound to protect their passengers from injuries by third persons and other passengers to the same extent as they are bound to protect them from injuries by their employes, yet it is their duty to use proper care and vigilance to protect them from injuries by such persons that might reasonably have been foreseen and anticipated.<sup>1</sup> As a railroad company is in duty bound to use care and vigilance to protect its passengers who have placed themselves under its control, and as it has the right and power to eject disorderly persons, it is liable to a passenger who, without fault on his part, is assaulted and injured by a stranger or a fellow passenger, if it or its employes in charge of the train could reasonably have foreseen and prevented it.<sup>2</sup> Thus, where an intoxicated and disorderly or dangerous person is knowingly admitted to the train,<sup>3</sup> or the conductor and other employes

<sup>1</sup> See *ante*, § 1591.

<sup>2</sup> *New Orleans, etc., R. Co. v. Burke*, 53 Miss. 200, s. c. 24 Am. R. 689; *Illinois Cent. R. Co. v. Minor*, 69 Miss. 710, s. c. 16 L. R. A. 627, 11 So. R. 101; *Richmond, etc., R. Co. v. Jefferson*, 89 Ga. 554, s. c. 32 Am. St. R. 87, and note; *Pittsburgh, etc., R. Co. v. Hinds*, 53 Pa. St. 512, s. c. 91 Am. Dec. 224; *Pittsburgh, etc., R. Co. v. Pillow*, 76 Pa. St. 510; *Britton v. Atlanta, etc., R. Co.*, 88 N. Car. 536, s. c. 43 Am. R. 740, 18 Am. & Eng. R. Cas. 391; *King v. Ohio, etc., R. Co.*, 22 Fed. R. 413, s. c. 18 Am. & Eng. R. Cas. 386; *Chicago, etc., R. Co. v. Pillsbury*, 123 Ill. 9, s. c. 31 Am. & Eng. R. Cas. 24; *Atchison, etc., R. Co. v. Weber*, 33 Kan. 543, s. c. 52 Am. R. 543. "There is an implied obligation, growing out of the contract between the carrier and the passenger that the former shall afford to the latter reasonable protection and immunity from the insults, violence and wanton interference of intruders, fellow-passengers, and the carrier and his servants." *Kinney v. Louisville,*

*etc., R. Co.*, (Ky.) 34 S. W. R. 1066; *Winnegar's Admr. v. Central, etc., R. Co.*, 85 Ky. 547, s. c. 4 S. W. R. 237; *Sherley v. Billings*, 8 Bush (Ky.) 147; 1 Add. Torts, 33, note; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202. But compare *Royston v. Illinois Cent. R. Co.*, 67 Miss. 376. In *Flint v. Norwich, etc., Transp. Co.*, 34 Conn. 554, the company was held liable for an injury to a passenger caused by the discharge of a gun, which was dropped by soldiers engaged in scuffling. So, where a person called to assist the conductor in ejecting a passenger uses excessive force. *International, etc., R. Co. v. Miller*, (Tex. Civ. App.) 28 S. W. R. 233; *Murphy v. Western, etc., R. Co.*, 23 Fed. R. 637; *Jardine v. Cornell*, 50 N. J. L. 485, s. c. 14 Atl. R. 590. So, where a passenger on a platform is injured by a mail pouch thrown by a postal clerk. *Carpenter v. Boston, etc., R. Co.*, 97 N. Y. 494.

<sup>3</sup> *Hendricks v. Sixth Ave. R. Co.*, 12 Jones & S. (N. Y.) 8; *Meyer v. St. Louis, etc., R. Co.*, 54 Fed. R. 116.

fail to take any steps to remove a passenger who becomes disorderly and dangerous, or to otherwise protect other passengers from him when they could do so,<sup>1</sup> the company will usually be liable for injuries caused by him to such other passengers. But if the company and its employes have no knowledge of the dangerous character or condition of the person who commits the injury and could not reasonably have foreseen and anticipated it, the company is not liable,<sup>2</sup> especially where its employes do all they can to prevent injury after discovering the sudden and unexpected danger.<sup>3</sup> Thus, where a passenger is slightly intoxicated, but apparently peaceable and well behaved, the company is not liable to another passenger suddenly and unexpectedly injured by him merely because it received him upon its train or did not eject him before he became disorderly.<sup>4</sup>

<sup>1</sup> *Flannery v. Baltimore, etc., R. Co.*, 4 Mackey (D. C.) 111; *Holly v. Atlanta, etc., R. Co.*, 61 Ga. 215, s. c. 34 Am. R. 97; *Pittsburgh, etc., R. Co. v. Hinds*, 53 Pa. St. 512; *Wright v. Chicago, etc., R. Co.*, 4 Colo. App. 102, 35 Pac. R. 196; *Evansville, etc., R. Co. v. Darting*, 6 Ind. App. 375; *Richmond, etc., R. Co. v. Jefferson*, 89 Ga. 554, s. c. 16 S. E. R. 69; *Lucy v. Chicago, etc., R. Co.*, (Minn.) 65 N. W. R. 944, s. c. 31 L. R. A. 551.

<sup>2</sup> *Connell's Exr. v. Chesapeake, etc., R. Co.*, (Va.) 24 S. E. R. 467, (passenger murdered by intruder at night); *Spohn v. Missouri Pac. R. Co.*, 87 Mo. 80; *Jackson v. Missouri Pac. R. Co.*, 104 Mo. 448; *Felton v. Chicago, etc., R. Co.*, 69 Iowa 577, (passenger thrown out of car by fellow-passenger); *Putnam v. Broadway, etc., R. Co.*, 55 N. Y. 108, s. c. 14 Am. R. 190; *Batton v. South, etc., R. Co.*, 77 Ala. 591, (female passenger insulted by intruders at station); *Mulligan v. New York, etc., R. Co.*, 129 N. Y. 506; *Galveston, etc., R. Co. v. Long*, (Tex. Civ. App.) 36 S. W. R. 485; *Louisville, etc., R. Co. v. McEwan*, (Ky.) 31 S. W. R. 465; *Pounder v. Northeastern R. Co.*,

L. R. (1892) 1 Q. B. 385, 390; *Smith v. Great Eastern, etc., R. Co.*, L. R. 2 C. P. 4. A railroad company is not bound to anticipate that a discharged employe will turn a switch and wreck a train out of revenge and the mere fact that it fails to get the key from him on discharging him will not render it liable. *East Tennessee, etc., R. Co. v. Kane*, 92 Ga. 187, s. c. 18 S. E. R. 18.

<sup>3</sup> *Mullan v. Wisconsin Cent. R. Co.*, 46 Minn. 474, s. c. 49 N. W. R. 249; *McGuinn v. Forbes*, 37 Fed. R. 639; *Kinney v. Louisville, etc., R. Co.*, (Ky.) 34 S. W. R. 1066.

<sup>4</sup> *Galveston, etc., R. Co. v. Long*, (Tex. Civ. App.) 36 S. W. R. 485; *Kinney v. Louisville, etc., R. Co.*, (Ky.) 34 S. W. R. 1066; *Pittsburgh, etc., R. Co. v. Vandyne*, 57 Ind. 576; *Thompson v. Manhattan R. Co.*, 27 N. Y. Supp. 608, s. c. 75 Hun 548. The mere fact that the conductor was present does not necessarily render the railroad company liable. *Springfield, etc., R. Co. v. Flynn*, 55 Ill. App. 600. See, also, *Gulf, etc., R. Co. v. Shields*, (Tex. Civ. App.) 28 S. W. R. 709.

So, where a passenger in boarding a train at a station was knocked down and robbed by some unknown person, it was held that the company was not liable.<sup>1</sup> A railroad company is not necessarily liable for injuries to a passenger caused by his being jolted off of the steps of the car by other passengers,<sup>2</sup> nor for injuries caused by a stranger hastily shutting a door in his face,<sup>3</sup> but it is liable in a proper case for injuries to passengers caused by a crowd at terminal gates, stations and on cars, where it has reason to expect the same and makes no provision to guard against danger therefrom.<sup>4</sup>

§ 1640. **Injuries received in sleeping cars.**—We have elsewhere called attention to the peculiar position occupied by sleeping car companies.<sup>5</sup> The contract of a passenger for carriage is with the railroad company rather than with the sleeping car company,<sup>6</sup> and the former is liable for injuries to its passengers in a sleeping car caused by its negligence or breach of duty which it owes them as a carrier of passengers. The employes of the sleeping car company, in so far as their duties relate to the carriage or transportation of passengers are regarded as the employes of the railroad company, where there

<sup>1</sup>*Sachrowitz v. Atchison, etc., R. Co.*, 37 Kan. 212, s. c. 34 Am. & Eng. R. Cas. 382. It was claimed in this case that the act was done by a brakeman, or other servant of the company, and the case is instructive upon the subject of identification, the court holding that it was insufficient.

<sup>2</sup>*Ellinger v. Philadelphia, etc., R. Co.*, 153 Pa. St. 213, *Jarmy v. Duluth St. R. Co.*, 55 Minn. 271, s. c. 56 N. W. R. 813; *Joliet St. R. Co. v. McCarthy*, 42 Ill. App. 49; *Randall v. Frankford, etc., R. Co.*, 139 Pa. St. 464; *Buck v. Manhattan, etc., R. Co.*, 15 Daly (N. Y.) 550. See, also, *Cleveland v. New Jersey Steamboat Co.*, 68 N. Y. 306, 125 N. Y. 299.

<sup>3</sup>*Graeff v. Philadelphia, etc., R. Co.*, 161 Pa. St. 230, s. c. 28 Atl. R. 1107,

23 L. R. A. 606; *Hayman v. Pennsylvania R. Co.*, 118 Pa. St. 508, s. c. 11 Atl. R. 815.

<sup>4</sup>*Taylor v. Pennsylvania R. Co.*, 50 Fed. R. 755; *Treat v. Boston, etc., R. Co.*, 131 Mass. 371; *Lynn v. Southern Pac. R. Co.*, 103 Cal. 7, 24 L. R. A. 710, and note; *Neslie v. Second, etc., St. R. Co.*, 113 Pa. St. 300, s. c. 6 Atl. R. 72; *Sheridan v. Brooklyn City R. Co.*, 36 N. Y. 39, s. c. 93 Am. Dec. 490; *Merwin v. Manhattan R. Co.*, 1 N. Y. S. 267, 49 Hun (N. Y.) 608; *Lott v. New Orleans, etc., R. Co.*, 37 La. Ann. 337. See, also, *Evansville, etc., R. Co. v. Duncan*, 28 Ind. 441, s. c. 92 Am. Dec. 322.

<sup>5</sup>*Ante*, § 1616.

<sup>6</sup>*Pullman Palace Car Co. v. Smith*, 73 Ill. 360, s. c. 24 Am. R. 258.



is no contract which changes the rule and which is or ought to be known to the passenger, so that the railroad company is liable for their negligence.<sup>1</sup> Thus, railroad companies have been held liable where berths fell upon passengers, owing to the negligence of the sleeping car employes,<sup>2</sup> and even for assaults committed upon them by sleeping car porters.<sup>3</sup> But the sleeping car company may also be liable for the negligent or wrongful acts of its employes<sup>4</sup> in the scope of their employment or line of duty to it, and, as we have elsewhere said, we believe there are some negligent acts or omissions for which it alone will be liable,<sup>5</sup> just as there are some for which the railroad company is liable. So, it is held in a recent case that a sleeping car company, though not a common carrier, is responsible to its passengers for the discharge of certain general duties involving the exercise of ordinary and reasonable care, among which is the duty to provide a properly warmed and comfortable car, and that a violation of this duty which proximately causes a cold and permanent injury to a passenger's eyes "may be made the subject-matter of an action either *ex contractu* or *ex delicto*."<sup>6</sup> But neither the sleeping car company nor the rail-

<sup>1</sup> *Williams v. Pullman, etc., Co.*, 40 La. Ann. 417, s. c. 4 So. R. 85. See, also, authorities cited in following notes; also, *ante*, §§ 1618, 1625.

<sup>2</sup> *Pennsylvania R. Co. v. Roy*, 102 U. S. 451; *Railroad Co. v. Walrath*, 38 Ohio St. 461; *Northern Pac. R. Co. v. Hess*, 2 Wash. 383, s. c. 26 Pac. R. 866.

<sup>3</sup> *Dwinelle v. New York Cent., etc., R. Co.*, 120 N. Y. 117, s. c. 8 L. R. A. 224, 24 N. E. R. 319; *Thorpe v. New York Cent., etc., R. Co.*, 76 N. Y. 402, s. c. 32 Am. R. 325; *Williams v. Pullman, etc., Co.*, 40 La. Ann. 417, s. c. 4 So. R. 85.

<sup>4</sup> *Pullman Palace Car Co. v. Smith*, 79 Tex. 468; *Meyer v. St. Louis, etc., R. Co.*, 54 Fed. R. 116; *Mann Boudoir Car Co. v. Dupre*, 54 Fed. R. 646, s. c. 21 L. R. A. 289, and note; *Campbell*

*v. Pullman, etc., Co.*, 42 Fed. R. 484; *Heenrich v. Pullman, etc., Co.*, 20 Fed. R. 100. But compare *Williams v. Pullman, etc., Co.*, 40 La. Ann. 87, s. c. 3 So. R. 631; *Pullman, etc., Co. v. Ehrman*, 65 Miss. 383.

<sup>5</sup> See *ante*, §§ 1618, 1621, 1625.

<sup>6</sup> *Hughes v. Pullman Palace Car Co.*, 74 Fed. R. 499. See, also, *Nevin v. Pullman, etc., Co.*, 106 Ill. 222, s. c. 11 Am. & Eng. R. Cas. 92; *Pullman, etc., Co. v. Booth*, (Tex. Civ. App.) 28 S. W. R. 719. But compare *Pullman Palace Car Co. v. Barker*, 4 Colo. 344, and *Pullman, etc., Co. v. Bales*, 80 Tex. 211, s. c. 47 Am. & Eng. R. Cas. 416. In this last case it was held that the company was not liable where its servants rudely pulled aside the curtain and exposed the plaintiff and his wife undressed in the same berth

road company is liable for an injury which is not proximately caused by the negligence of either. In other words, neither is an insurer of the safety of passengers. Thus, in another recent case, it was held that where an intruder entered the car at night for the purpose of robbery and killed a passenger there was no liability in the absence of any knowledge of danger on the part of the employes or any circumstances to arouse their suspicion.<sup>1</sup>

§ 1641. **Injuries received at stations.**—We have elsewhere treated of the limited duty of railroad companies to trespassers and licensees at stations, and have shown that a higher duty is due to those who come upon the invitation of the company

where they had no right to both occupy one berth together. So, where a passenger on an ordinary car, without right entered a sleeping car to induce the steward to sell him liquor in violation of law, it was held that the sleeping car company was not liable for an assault on him by the steward. *Cassedy v. Pullman, etc., Co.*, (Miss.) 17 So. R. 373.

<sup>1</sup> *Connell's Exs. v. Chesapeake, etc., R. Co.*, (Va.) 24 S. E. R. 467. Among other things, the court said: "Experience teaches us that, when property is exposed to theft, it is apt to be stolen; but murder is of infrequent occurrence. When, therefore, a sleeping-car company receives a passenger, and he retires to rest, it may well be assumed to anticipate and be required to guard and protect him against a crime which is likely to occur whenever the temptation and the opportunity are presented. It can not be deemed to have anticipated nor be expected to guard and protect him against a crime so horrid, and happily so rare, as that of murder. There is no casual connection between the negligence pleaded and the injury sustained. In a peaceful community,

in a law-abiding and Christian land, a car of the defendant company is invaded in the night-time by an assassin, and an innocent man falls a victim to his murderous assault. Can it be said that, in leaving a door ajar, in permitting a stranger or passenger to enter, the defendants were guilty of negligence, when to hold them negligent would be to say that they should have expected the tragedy which gave rise to this action? To do so would be to require of them more than human foresight as to the minds and motives of men, and make them, indeed, insurers of the safety of passengers, while under their care, against all dangers, however remotely connected with their acts of omission or commission." The court cited, among other cases, *Pittsburgh, etc., R. Co. v. Hinds*, 53 Pa. St. 512; *Scheffer v. Railroad Co.*, 105 U. S. 249; *Putnam v. Broadway R. Co.*, 55 N. Y. 108; *Britton v. Atlanta, etc., R. Co.*, 88 N. Car. 536; *Batton v. South, etc., R. Co.*, 77 Ala. 591; *Pounder v. Northeastern R. Co.*, L. R., (1892) 1 Q. B. 390. See, also, *Davis v. Chicago, etc., R. Co.*, (Wis.) 67 N. W. R. 16.

to do business with it or to assist passengers in arriving and departing.<sup>1</sup> Here we shall consider the duty of the company to passengers with respect to its stations and platforms and its liability for injuries received by them at such places. It is the duty of a railroad company to keep its stations, platforms and approaches in such a condition that passengers who have occasion to use them for the purpose for which they are designed can do so in safety, and a passenger who is injured by a breach of this duty, without contributory negligence on his part, may maintain an action for damages against the company.<sup>2</sup> Thus, railroad companies have been held liable for injuries to passengers by reason of broken planks or other similar defects in their platforms,<sup>3</sup> by reason of the platform being placed higher than the platform of the coach so that passengers were required to get in and out through the baggage car,<sup>4</sup> and by reason of the platform being too narrow and

<sup>1</sup> See *ante*, § 1256.

<sup>2</sup> *Sweeny v. Old Colony R. Co.*, 10 Allen (Mass.) 368; *Dodge v. Boston, etc., Co.*, 148 Mass. 207, s. c. 2 L. R. A. 83, and note; *Railroad Co. v. Hanning*, 15 Wall (U. S.) 649; *McDonald v. Chicago, etc., R. Co.*, 26 Iowa 124; *Bennett v. Railroad Co.*, 102 U. S. 577; *Texas, etc., R. Co. v. Orr*, 46 Ark. 182; *Louisville, etc., R. Co. v. Lucas*, 119 Ind. 583, s. c. 21 N. E. R. 968; *Pennsylvania R. Co. v. Marion*, 123 Ind. 415, s. c. 23 N. E. R. 973; *Kelley v. Manhattan R. Co.*, 112 N. Y. 443, s. c. 20 N. E. R. 383; *Cooley on Torts*, 604; *Beach on Contrib. Neg.*, (2d. ed.) § 160; *Bishop Non-Cont. Law*, § 1086; *Longmore v. Great Western R. Co.*, 19 C. B. N. S. 183; *Green v. Pennsylvania R. Co.*, 36 Fed. R. 66; *Collins v. Toledo, etc., R. Co.*, 80 Mich. 390, s. c. 45 N. W. R. 178; *Hoffman v. New York, etc., R. Co.*, 75 N. Y. 605; *Keefe v. Boston, etc., R. Co.*, 142 Mass. 251; *Waller v. Missouri, etc., R. Co.*, 59 Mo. App. 410; *Alexandria, etc., R.*

*Co. v. Herndon*, 87 Va. 193, s. c. 12 S. E. R. 289; *Texas, etc., R. Co. v. Brown*, 78 Tex. 397, s. c. 14 S. W. R. 1034; *ante*, § 1590. No defense that station is used in conjunction with another company. *Louisville, etc., R. Co. v. Lucas*, 119 Ind. 583, s. c. 21 N. E. R. 968. See, also, *Skottowe v. Oregon, etc., R. Co.*, 22 Ore. 430. Or that the company is a mere lessee. *Montgomery, etc., R. Co. v. Thompson*, 77 Ala. 448, s. c. 54 Am. R. 72.

<sup>3</sup> *Louisville, etc., R. Co. v. Lucas*, 119 Ind. 583, s. c. 21 N. E. R. 968; *Toledo, etc., R. Co. v. Grush*, 67 Ill. 262; *Liscomb v. New Jersey, etc., Railroad, etc., Co.*, 6 Lans. 75; *Knight v. Portland, etc., R. Co.*, 56 Me. 234; *Fullerton v. Fordyce*, 121 Mo. 1, s. c. 25 S. W. R. 587; *Ft. Worth, etc., R. Co. v. Davis*, 4 Tex. Civ. App. 351, s. c. 23 S. W. R. 737 (sharp railroad spike in platform.)

<sup>4</sup> *Turner v. Vicksburg, etc., R. Co.*, 37 La. Ann. 648. See, also, *Collins v. Toledo, etc., R. Co.*, 80 Mich. 390.

too near the track.<sup>1</sup> So, where passengers are received and discharged after dark it is the duty of the company to light its stations or platforms, and it is liable to a passenger who is injured without fault on his part by reason of its failure to do so.<sup>2</sup> A railroad company is not, however, bound to have a platform at a mere road crossing at which trains stop on signal for the mere convenience of those desiring passage,<sup>3</sup> nor to have a platform on each side of the track,<sup>4</sup> and if it has a reasonably safe and suitable platform it is not liable for a purely accidental injury to a passenger thereon.<sup>5</sup> So, of course,

<sup>1</sup> *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *Union Pac. R. Co. v. Sue*, 25 Neb. 772; *Lake Shore, etc., R. Co. v. Ward*, 135 Ill. 511, s. c. 26 N. E. R. 520; *Hurlbert v. New York, etc., R. Co.*, 40 N. Y. 145. So, it has been held that it may be negligence to require a passenger to alight on a small box. *Missouri Pac. R. Co. v. Wortham*, 73 Tex. 25. But a passenger who trips over the feet of a baggage master engaged in unloading baggage in the usual way, where there is ten feet of unobstructed platform in which to pass, can not recover. *Connor v. Concord, etc., R. Co.*, (N. H.) 30 Atl. R. 1121. Otherwise where the baggageman carelessly runs a truck over him while on the platform. *Chicago, etc., R. Co. v. Woolridge*, 72 Ill. App. 237.

<sup>2</sup> *Moses v. Louisville, etc., R. Co.*, 39 La. Ann. 649, s. c. 2 So. R. 567; *Reynolds v. Texas, etc., R. Co.*, 37 La. Ann. 694; *Alabama, etc., R. Co. v. Arnold*, 84 Ala. 159, s. c. 4 So. R. 359; *Fordyce v. Merrill*, 49 Ark. 277, s. c. 5 S. W. R. 329; *Grimes v. Pennsylvania Co.*, 36 Fed. R. 72; *Wallace v. Wilmington, etc., R. Co.*, 8 Hous. (Del.) 529, s. c. 18 Atl. R. 818; *Stewart v. International, etc., R. Co.*, 53 Tex. 289; *Alexandria, etc., R. Co. v. Herndon*, 87 Va. 193, s. c. 12 S. E. R. 289; *Beard v. Connecticut, etc., R. Co.*, 48

Vt. 101; *Quaife v. Chicago, etc., R. Co.*, 48 Wis. 513, s. c. 4 N. W. R. 658; *Buenemann v. St. Paul, etc., R. Co.*, 32 Minn. 390, s. c. 20 N. W. R. 379; *Nicholson v. Lancashire, etc., R. Co.*, 3 H. & C. 534. But where the company furnished all the light that experience had shown to be necessary, it was held not to be liable in a recent case. *Laffin v. Buffalo, etc., R. Co.*, 106 N. Y. 136. Reasonable care in lighting is all that is necessary. *Hiatt v. Des Moines, etc., R. Co.*, (Iowa) 64 N. W. R. 766.

<sup>3</sup> *Alabama, etc., R. Co. v. Stacy*, 68 Miss. 463, s. c. 9 So. R. 349; *Cincinnati, etc., R. Co. v. Peters*, 80 Ind. 168, s. c. 6 Am. & Eng. R. Cas. 126. Nor at the end of a new and incomplete road, where the passenger is aware of its incomplete condition. *Chicago, etc., R. Co. v. Frazer*, 55 Kan. 582, 40 Pac. R. 923.

<sup>4</sup> *Michigan Cent. R. Co. v. Coleman*, 28 Mich. 440. But when a passenger, without fault, got off on the opposite side from the platform, and was struck by a passing train, the railroad company was held liable. *Van Ostran v. New York, etc., R. Co.*, 35 Hun 590, 104 N. Y. 683; *McQuilken v. Central Pac. R. Co.*, 64 Cal. 463. But see, *ante*, § 1628, p. 2550, note 1.

<sup>5</sup> *Stokes v. Suffolk, etc., R. Co.*, 107 N. Car. 178, s. c. 11 S. E. R. 991. All

if the passenger is guilty of negligence, which is a proximate cause of his injury, he can not recover.<sup>1</sup> A passenger is not necessarily negligent in going to his train in the usual way in the dark or in unintentionally getting out of the proper way in the dark in seeking a safe place,<sup>2</sup> but if he recklessly and unnecessarily wanders about in the dark and walks off of the platform, or the like,<sup>3</sup> or goes through a dark passage or down a dark stairway in making his exit, when other passages or ways, plainly intended for that purpose, are properly lighted and open to his sight, he can not recover for an injury received in consequence thereof.<sup>4</sup> So, where a passenger, in going to a train fell over lumber which he knew was upon the platform but had forgotten about, he was held guilty of contributory negligence.<sup>5</sup> The duty of railroad companies to exercise ordinary care to keep their stations reasonably safe for passengers extends to water-closets and similar accommodations intended for their use,<sup>6</sup> and it has also been held that it is the

that is required is ordinary and reasonable care on its part. *Ante*, § 1590.

<sup>1</sup> *Illinois, etc., R. Co. v. Green*, 81 Ill. 19, s. c. 25 Am. R. 255; *Evansville, etc., R. Co. v. Duncan*, 28 Ind. 441; *Forsyth v. Boston, etc., R. Co.*, 103 Mass. 510; *Renneker v. South Carolina R. Co.*, 20 S. Car. 219, s. c. 18 Am. & Eng. R. Cas. 149; *Little Rock, etc., R. Co. v. Cavenesse*, 48 Ark. 106, s. c. 2 S. W. R. 506; *Gunderman v. Missouri, etc., R. Co.*, 58 Mo. App. 370; *Railway Co. v. Cox*, 60 Ark. 106, s. c. 20 S. W. R. 38. But the defect must be such as would suggest danger to a man of ordinary understanding and reasonable prudence, and a passenger is not obliged to make a close inspection, such as the company or its servants might be required to make. *Ohio, etc., R. Co. v. Stansberry*, 132 Ind. 533, s. c. 32 N. E. R. 218.

<sup>2</sup> *Wallace v. Wilmington, etc., R. Co.*, 8 Hous. (Del.) 529, s. c. 18 Atl. R. 818; *Moses v. Louisville, etc., R. Co.*,

39 La. Ann. 649, s. c. 2 So. R. 567; *Missouri Pac. R. Co. v. Neiswanger*, 41 Kan. 621; *Louisville, etc., R. Co. v. Treadway*, 142 Ind. 475, s. c. 40 N. E. R. 807, 41 N. E. R. 794; *Texas, etc., R. Co. v. Brown*, 78 Tex. 397, s. c. 14 S. W. R. 1034. See, also, *Kentucky, etc., Co. v. McKinney*, 9 Ind. App. 213, s. c. 36 N. E. R. 448.

<sup>3</sup> *Reed v. Axtell*, 84 Va. 231, s. c. 4 S. E. R. 587; *Sturgis v. Detroit, etc., R. Co.*, 72 Mich. 619; *Gulf, etc., R. Co. v. Hodges*, (Tex. Civ. App) 24 S. W. R. 563.

<sup>4</sup> *Bennett v. New York, etc., R. Co.*, 57 Conn. 422, s. c. 18 Atl. R. 668. See, also, *Forsyth v. Boston, etc., R. Co.*, 103 Mass. 510.

<sup>5</sup> *Wood v. Richmond, etc., R. Co.*, 100 Ala. 660, s. c. 13 So. R. 552. See, also, *Chicago, etc., R. Co. v. Mahara*, 47 Ill. App. 208.

<sup>6</sup> *McKone v. Michigan, etc., R. Co.*, 51 Mich. 601, s. c. 17 N. W. R. 74; *Missouri Pac. R. Co. v. Neiswanger*, 41

duty of such companies to provide and maintain a comfortable room in which passengers may stay while waiting for their trains.<sup>1</sup> But if a railroad company has exercised ordinary and reasonable care, we think it is not liable for failing to guard against accidents that could not reasonably have been anticipated,<sup>2</sup> and a passenger is certainly not justified in voluntarily incurring an obvious danger merely to avoid a temporary inconvenience.<sup>3</sup>

§ 1642. **Contributory negligence.**—We have already treated different phases of the subject of contributory negligence so fully in considering injuries received by passengers under particular circumstances that little remains to be said. As a general rule a passenger, like every one else, is bound to exercise ordinary and reasonable care to avoid or prevent injury to himself, and if his failure to do so proximately causes or contributes to his injury, he can not recover,<sup>4</sup> unless the injury was willfully inflicted under such circumstances as to make the company responsible. Whether he exercised such care or not is usually a question for the jury to determine,<sup>5</sup> but, as we

Kan. 621; *Jordan v. New York, etc., R. Co.*, 165 Mass. 346, s. c. 32 L. R. A. 101.

<sup>1</sup> *McDonald v. Chicago, etc., R. Co.*, 26 Iowa 124. As to the liability of the company for illness or other injuries caused by exposure in such a case, see *Boothby v. Grand Trunk R. Co.*, (N. H.) 34 Atl. R. 157; *Texas, etc., R. Co. v. Cornelius*, (Tex. Civ. App.) 30 S. W. R. 720; *Texas, etc., R. Co. v. Pierce*, (Tex. Civ. App.) 30 S. W. R. 1122.

<sup>2</sup> *Crafter v. Metropolitan, etc., R. Co.*, L. R. 1 C. P. 300; *Cornman v. Eastern, etc., R. Co.*, 4 H. & N. 781. See, also, *ante*, § 1590.

<sup>3</sup> *Adams v. Lancashire, etc., R. Co.*, L. R. 4 C. P. 739.

<sup>4</sup> *Wahl v. Shoulder*, (Ind. App.) 43 N. E. R. 458; *Jeffersonville, etc., R. Co. v. Hendricks*, 26 Ind. 228; Penn-

sylvania R. Co. v. *Aspell*, 23 Pa. St. 147, s. c. 62 Am. Dec. 323; *Price v. St. Louis, etc., R. Co.*, 72 Mo. 414; *Fisher v. West Virginia, etc., R. Co.*, (W. Va.) 24 S. E. R. 570; *MacLeod v. Graven*, 73 Fed. R. 627; notes to *Freer v. Cameron*, 55 Am. Dec. 663, (4 Rich. L. 228) and *Hartfield v. Roper*, 34 Am. Dec. 273, (21 Wend. 615); *Thomp. on Carriers*, 257; *Pattersons Ry. Acc. Law*, 46; *Beach on Contrib. Neg.*, §§ 14, 145. This general rule is so well settled and has been so often referred to and its application so fully shown in the preceding sections of this chapter, that citation of the numerous authorities is here unnecessary.

<sup>5</sup> *Beach on Contrib. Neg.*, §§ 444, 450; *Eichorn v. Missouri, etc., R. Co.*, 130 Mo. 575, 32 S. W. R. 993; *Brodie v. Carolina, etc., R. Co.*, (S. Car.) 24 S. E. R. 180; *Missouri, etc., R. Co. v.*

have seen, his conduct may be such as to constitute negligence *per se* or make a *prima facie* case of contributory negligence against him, and it is a general rule that if the facts are undisputed and but one reasonable inference can be drawn therefrom the court should draw it and take the case away from the jury.<sup>1</sup> On the other hand, as we have also shown, if his negligence had nothing to do with causing the injury, or did not proximately contribute thereto, he can not be defeated upon the ground of contributory negligence,<sup>2</sup> and this is also true where he does an act not obviously dangerous under the direction of employes upon whose knowledge and directions he has a right to rely, notwithstanding such act, if performed without such directions, or if known to him to be dangerous, might have been negligent.<sup>3</sup> So, where he is placed in imminent peril by the negligence of the company he may recover, in a proper case, for injuries received in attempting to escape or avoid it, if he exercised ordinary and reasonable care under the circumstances as they reasonably appeared to him at the time, although in acting upon the spur of the moment and under excitement he did not do what was best, or would not have been injured if he had done nothing but to remain quiet.<sup>4</sup>

Meyers, (Tex. Civ. App.) 35 S. W. R. 421; Henshaw v. Raleigh, etc., R. Co., (N. Car.) 24 S. E. R. 426; Omaha, etc., R. Co. v. Crow, (Neb.) 66 N. W. R. 21; Georgia, etc., R. Co. v. Watkins, (Ga.) 24 S. E. R. 34; *ante*, § 1628, p. 2548, notes, 1 and 2.

<sup>1</sup> Elliott's Gen. Pr., §§ 437, 887, 889; *ante*, §§ 1628, 1630, 1632, 1633; Beach on Contrib. Neg., §§ 447, 449.

<sup>2</sup> See, also, Beach on Contrib. Neg., §§ 33, 34.

<sup>3</sup> See *post*, § 1643.

<sup>4</sup> St. Joseph, etc., R. Co. v. Hedge, 44 Neb. 448, 62 N. W. R. 887; Iron R. Co. v. Mowery, 36 Ohio St. 418; South Covington, etc., R. Co. v. Ware, 84 Ky. 267, s. c. 1 S. W. R. 493; Wilson

v. Northern, etc., R. Co., 26 Minn. 278, s. c. 3 N. W. R. 333; Cuyler v. Decker, 20 Hun (N. Y.) 173; Shannon v. Boston, etc., R. Co., 78 Me. 52; Dimmey v. Wheeling, etc., R. Co., 27 W. Va. 32; Bischoff v. People's R. Co., 121 Mo. 216, s. c. 25 S. W. R. 908; Odom v. St. Louis, etc., R. Co., 45 La. Ann. 1201, s. c. 14 So. R. 734; Beach on Contrib. Neg. §§ 40, 41; *ante*, § 1627. But the fear or peril must be caused by the negligence or wrong of the company and not by the passenger himself. Austin, etc., R. Co. v. Beatty, 73 Tex. 592, s. c. 11 S. W. R. 858; Reary v. Louisville, etc., R. Co., 40 La. Ann. 32, s. c. 3 So. R. 390; Woolery v. Louisville, etc., R. Co., 107 Ind. 381, s. c. 57 Am. R. 114; Chicago, etc., R.

§ 1643. **Effect of directions by trainmen to occupy dangerous position.**—A passenger who might otherwise have been defeated upon the ground of contributory negligence may sometimes recover because he acted under the directions of the conductor. There is some conflict among the authorities as to how far a passenger is justified in acting upon an invitation or order of a trainman, but is clear that he may do so if the trainman is authorized, either expressly or impliedly, to give the invitation or order and the act is not such as the passenger ought to know is dangerous or in violation of the company's rules, and it is equally clear that where he knows that the act is in violation of the rules of the company and will place him in imminent peril he is not justified in taking the risk and can not hold the company liable if he is injured in so doing, even though he acted upon the advice or under the directions of the conductor or other trainmen. The conflict exists in the disputed territory between these two extremes. The solution of the problem may sometimes depend upon the authority, or apparent authority of the employe, to give the permission or order or to waive a rule of the company, or it may depend upon the nature of the act, that is, whether it is so dangerous that a reasonably prudent man would not, in the exercise of ordinary care, perform it even with the permission or under the direction of the employe. Where the directions of the employe are within the scope of his authority and obedience to them will not expose a passenger to known or apparent danger which a prudent man would not incur, the passenger is justified in acting upon them and is not necessarily guilty of contributory negligence, although he may be injured in so doing.<sup>1</sup> But if the danger is obvious and such as a reasonably

Co. v. Felton, 125 Ill. 458, s. c. 17 N. 227, 14 N. W. R. 46; Filer v. New E. R. 765. York, etc., R. Co., 49 N. Y. 47; St.

<sup>1</sup>Cincinnati, etc., R. Co. v. Carper, 112 Ind. 26, s. c. 13 N. E. R. 122; Louisville, etc., R. Co. v. Kelly, 92 Ind. 371, s. c. 47 Am. R. 149; Louisville, etc., R. Co. v. Bisch, 120 Ind. 549; Pool v. Chicago, etc., R. Co., 53 Wis. 657, s. c. 11 N. W. R. 15, 56 Wis. 227, 14 N. W. R. 46; Filer v. New York, etc., R. Co., 49 N. Y. 47; St. Louis, etc., R. Co. v. Cantrell, 37 Ark. 519, s. c. 40 Am. R. 105; Fowler v. Baltimore, etc., R. Co., 18 W. Va. 579; Philadelphia, etc., R. Co. v. Boyer, 97 Pa. St. 91; Indianapolis, etc., R. Co. v. Horst, 93 U. S. 291; St. Louis, etc., R. Co. v. Person, 49 Ark. 182, s. c. 4 S.



prudent man would not incur under the circumstances the passenger must not assume the risk, for he will be guilty of negligence if he does so, especially if he acts on the mere permission or invitation of the employe, or if he knows, or ought to know, that the employe has no authority to give the direction or that the act is in violation of a rule of the company intended for the safety of passengers.<sup>1</sup> This, we think, is the true distinction, although there are many authorities which go very far towards exonerating a passenger where he obeys the directions of an employe, even where it is obviously dangerous to do so, or is in violation of the rules of the company.<sup>2</sup>

W. R. 755; *Lake Shore, etc., R. Co. v. Brown*, 123 Ill. 162, s. c. 5 Am. St. R. 510; *Kansas, etc., R. Co. v. Dorrough*, 72 Tex. 108; *Lent v. New York, etc., R. Co.*, 120 N. Y. 467; *Bucher v. New York, etc., R. Co.*, 98 N. Y. 128; *Baltimore, etc., R. Co. v. Kane*, 69 Md. 11; *Central R. Co. v. Smith*, 69 Ga. 268; *McCaslin v. Lake Shore, etc., R. Co.*, 93 Mich. 553; *Hutchinson on Carriers*, (2d ed.) §§ 535, 661c.

<sup>1</sup> *Pennsylvania R. Co. v. Langdon*, 92 Pa. St. 21, s. c. 37 Am. R. 651; *Cincinnati, etc., R. Co. v. Carper*, 112 Ind. 26, s. c. 13 N. E. R. 122, 123; *Cincinnati, etc., R. Co. v. McClain*, (Ind.) 44 N. E. R. 306; *South, etc., R. Co. v. Schaufler*, 75 Ala. 136; *Pennsylvania R. Co. v. Lyons*, 129 Pa. St. 113, s. c. 18 Atl. R. 759; *Chicago, etc., R. Co. v. Randolph*, 53 Ill. 510, s. c. 5 Am. R. 60; *Florida Southern R. Co. v. Hirst*, 30 Fla. 1, s. c. 16 L. R. A. 631, and note; *Hunter v. Coopers-town, etc., R. Co.*, 112 N. Y. 371; *Aufdenberg v. St. Louis, etc., R. Co.*, (Mo.) 34 S. W. R. 485; *Railroad Co. v. Jones*, 95 U. S. 439; *Bardwell v. Mobile, etc., R. Co.*, 63 Miss. 574; *Lindsey v. Chicago, etc., R. Co.*, 64 Iowa 407, s. c. 20 N. W. R. 737; *Vimont v. Chicago, etc., R. Co.*, 71 Iowa 58, s. c. 32 N. W. R. 100; *Herman v. Chicago, etc., R. Co.*, 79 Iowa 161, s. c. 44

N. W. R. 298; *Powers v. Boston, etc., R. Co.*, 153 Mass. 188, s. c. 26 N. E. R. 446; *Hickey v. Boston, etc., R. Co.*, 14 Allen (Mass.) 429; *Richmond, etc., R. Co. v. Morris*, 31 Gratt. (Va.) 200; *St. Louis, etc., R. Co. v. Rice*, (Tex. Civ. App.) 29 S. W. R. 525; *Beach on Contrib. Neg.*, (2d ed.) §§ 152, 153, 154; 2 *Wood on Railways*, §§ 121, 1277; *ante*, § 1628, p. 2551, note 1. See, also, *Waterbury v. New York, etc., R. Co.*, 17 Fed. R. 671, and note on page 690, *et seq.*; *Lake Shore, etc., R. Co. v. Pinchin*, 112 Ind. 592, s. c. 13 N. E. R. 677; *Little Rock, etc., R. Co. v. Miles*, 40 Ark. 298; *Cincinnati, etc., R. Co. v. Peters*, 80 Ind. 168.

<sup>2</sup> *Hanson v. Mansfield R. Co.*, 38 La. Ann. 111, s. c. 58 Am. R. 162; *Galloway v. Chicago, etc., R. Co.*, 87 Iowa 458, s. c. 54 N. W. R. 447; *Lambeth v. North Carolina, etc., R. Co.*, 66 N. Car. 494, s. c. 8 Am. R. 508; *Georgia, etc., R. Co. v. McCurdy*, 45 Ga. 288, s. c. 12 Am. R. 577; *Jones v. Chicago, etc., R. Co.*, 43 Minn. 279, s. c. 45 N. W. R. 444; *Irish v. Northern Pac. R. Co.*, 4 Wash. 48, 29 Pac. R. 845; *Philadelphia, etc., R. Co. v. Derby*, 14 How. (U. S.) 468; *Beach on Contrib. Neg.*, (2d ed.) § 148; *Hutchinson on Carriers*, (2d ed.) § 654; *ante*, § 1631, p. 2560, note 1.

§ 1644. **Burden of proof.**—As in other cases, one who sues a railroad company for personal injuries received while on its train as a passenger has, of course, the burden of proving all the material facts necessary to constitute his cause of action, including negligence on the part of the company.<sup>1</sup> But negligence may often be inferred from circumstances and proof of the accident and injury may sometimes not only justify such an inference, but may also give rise to a presumption of negligence on the part of the company and make a *prima facie* case against it so far as proof of its negligence is necessary.<sup>2</sup> It is sometimes said the fact that a passenger is injured on a carrier's train raises a presumption of negligence on its part and makes a *prima facie* case, so far as such negligence is concerned, sufficient to cast the burden upon the carrier to show that it was not guilty of negligence, and to entitle the plaintiff to recover, if free from contributory negligence, unless it rebuts such presumption.<sup>3</sup> But in most of the cases in which such a broad statement of the rule was made it was unnecessary to state it in such general terms and the facts were such as to show that the injury could not well have been inflicted but for the negligence of the company, or the like. We think it clear that if the plaintiff, by his own evidence, shows that the accident was caused, or probably caused, by the act of God, or some

<sup>1</sup> *Deyo v. New York Cent. R. Co.*, 34 N. Y. 9; *Holbrook v. Utica, etc., R. Co.*, 12 N. Y. 236; *Button v. Hudson River R. Co.*, 18 N. Y. 248; *Chicago, etc., R. Co. v. Felton*, 125 Ill. 458, s. c. 17 N. E. R. 765; *Hardwick v. Georgia, etc., R. Co.*, 85 Ga. 507, s. c. 11 S. E. R. 832; *Herstine v. Lehigh Valley, etc., R. Co.*, 151 Pa. St. 244, s. c. 25 Atl. R. 104; *Cotton v. Wood*, 8 Com. B. (N. S.) 568; *Hutchinson on Carriers*, (2d ed.) §§ 798, 799.

<sup>2</sup> In some cases, "the very nature of the accident" it is said, "may of itself, and through the presumption it carries, supply the requisite proof." *Whart. on Neg.*, § 421.

<sup>3</sup> *Baltimore, etc., R. Co. v. Swann*, 81 Md. 400, 32 Atl. R. 175, 176, and cases cited; *Laing v. Colder*, 8 Pa. St. 479, (distinguished and qualified in several Pennsylvania cases hereafter cited); *Galea, etc., R. Co. v. Yarwood*, 17 Ill. 509; *Zemp v. Wilmington, etc., R. Co.*, 9 Rich. L. 84; *Yeomans v. Contra Costa, etc., Co.*, 44 Cal. 71; *George v. St. Louis, etc., R. Co.*, 34 Ark. 613; *Saltonstall v. Stockton, Taney (U. S. C. C.)* 11, affirmed in *Stokes v. Saltonstall*, 13 Pet. 181; *Louisville, etc., R. Co. v. Jones*, 83 Ala. 376, s. c. 3 So. R. 902, limited in *Georgia Pac. R. Co. v. Love*, 91 Ala. 432; *Carter v. Kansas City, etc., R. Co.*, 42 Fed. R. 37.

other unavoidable cause, not within the control of the company, the burden is not cast upon it although the plaintiff may have been injured while a passenger on its train.<sup>1</sup> So, where a missile came through the window and struck a passenger, and there was no showing as to where it came from, it was held that there was no presumption of negligence on the part of the company.<sup>2</sup> In another case the injury was caused by a rock becoming detached from a hillside above and beyond the railroad cut and falling upon the train, and it was held that there was no presumption of negligence on the part of the company and that the burden of proving it remained upon the plaintiff.<sup>3</sup> Again, suppose the plaintiff merely shows that he had his arm broken while a passenger on the defendant's train, and then rests his case. This might have happened entirely because of his own fault, or that of some one outside of the car and not under the control of the company, or it might have been caused by the negligence of the company. Mere proof of the injury without showing any collision, derailment, or other cause or circumstances certainly raises no presumption of negligence on the part of the company. "If the witness who swears to the injury testifies also that it was caused by a crash in a collision with another train of cars belonging to the same carrier," the presumption of negligence will generally arise. "On the other hand, if the witness who proves this injury swears that at the moment when it happened he heard the report of a gun outside of the car and found a bullet in the fractured limb, the presumption would be against the negligence of the carrier. \* \* \* The presumption arises

<sup>1</sup> *McClary v. Sioux City, etc., R. Co.*, 3 Neb. 44; *Gillespie v. St. Louis, etc., R. Co.*, 6 Mo. App. 554; *Smith v. St. Paul, etc., R. Co.*, 32 Minn. 1, s. c. 18 N. W. R. 827, 50 Am. R. 550; *Norfolk, etc., R. Co. v. Marshall*, 90 Va. 836, 20 S. E. R. 823.

<sup>2</sup> *Pennsylvania R. Co. v. MacKinney*, 124 Pa. St. 462, s. c. 17 Atl. R. 14, 2 L.

R. A. 820; *Thomas v. Philadelphia, etc., R. Co.*, 148 Pa. St. 180, s. c. 23 Atl. R. 989.

<sup>3</sup> *Fleming v. Pittsburgh, etc., R. Co.*, 158 Pa. St. 130, s. c. 27 Atl. R. 858, 38 Am. St. R. 835, and note, distinguishing *Gleeson v. Virginia, etc., R. Co.*, 140 U. S. 435, s. c. 11 Sup. Ct. R. 859, 4 Lewis' Am. R. Corp. R. 398.

from the cause of the injury, or from other circumstances attending it, and not from the injury itself."<sup>1</sup> So the mere fact that a passenger is injured in boarding or alighting from a train does not raise a presumption of negligence on the part of the company and cast the burden upon it, where it is not shown that the train suddenly moved, or other circumstances are not shown which will afford a basis for such a presumption.<sup>2</sup> Many other illustrations might be given, if necessary, to show that mere proof of injury to a passenger is not always sufficient to raise a presumption of negligence on the part of the company and shift the burden of proof.<sup>3</sup> It is, therefore, too broad a statement of the rule to say that, in all cases, a presumption of negligence on the part of the carrier arises from the mere happening of an accident or an injury to a passenger regardless of the circumstances and nature of the accident.<sup>4</sup> The true rule would seem to be that when the injury and circumstances at-

<sup>1</sup> *Holbrook v. Utica, etc., R. Co.*, 12 N. Y. 236.

<sup>2</sup> *Delaware, etc., R. Co. v. Napheys*, 90 Pa. St. R. 135, s. c. 1 Am. & Eng. R. Cas. 52; *Dennis v. Pittsburg, etc., R. Co.*, 165 Pa. St. 624, s. c. 31 Atl. 52; *Mitchell v. Chicago, etc., R. Co.*, 51 Mich. 236, s. c. 12 Am. & Eng. R. 163; *Chicago, etc., R. Co. v. Trotter*, 60 Miss. 442; *Railroad Co. v. Mitchell*, 11 Heisk. (Tenn.) 400. See, also, *Etson v. Ft. Wayne, etc., R. Co.* (Mich.) 68 N. W. R. 298; *Bradley v. Ft. Wayne, etc., R. Co.*, 94 Mich. 35, s. c. 53 N. W. R. 915.

<sup>3</sup> Thus, it is held that there is no presumption of negligence on the part of the company where a passenger stumbles over baggage in the aisle. *Stimson v. Milwaukee, etc., R. Co.*, 75 Wis. 381, s. c. 44 N. W. R. 748. See, also, *Morris v. New York Cent., etc., R. Co.*, 106 N. Y. 678; *Farley v. Philadelphia, etc., Co.*, 132 Pa. St. 58. So, we suppose that no such presumption necessarily arises where he is hurt in a personal controversy with another

passenger, or by an assault of a mob, "road agents," or the like.

<sup>4</sup> *Long v. Pennsylvania R. Co.*, 147 Pa. St. 343, s. c. 30 Am. St. R. 732, and note, 23 Atl. R. 459, 460; *Herstine v. Lehigh Valley R. Co.*, 151 Pa. St. 244, s. c. 25 Atl. R. 104; *Curtis v. Rochester, etc., Co.*, 18 N. Y. 534, (approved and followed in *Transportation Co. v. Downer*, 11 Wall. 129; *Holbrook v. Utica, etc., R. Co.*, 12 N. Y. 236; *Saunders v. Chicago, etc., R. Co.* (So. Dak.) 60 N. W. R. 148; *Le Barron v. East Boston Ferry Co.*, 11 Allen (Mass.) 312; *Hawkins v. Front Street, etc., Co.*, 3 Wash. 592, s. c. 28 Am. St. R. 72; *Stern v. Michigan Cent. R. Co.*, 76 Mich. 591, s. c. 43 N. W. R. 587; *Federal Street, etc., R. Co. v. Gibson*, 96 Pa. St. 83; *Daniel v. Metropolitan R. Co.*, L. R. 3 C. P. 216, 591, L. R. 5 H. L. 45; *Welfare v. London, etc., R. Co.*, L. R. 4 Q. B. 693; *Dougherty v. Missouri Pac. R. Co.*, 9 Mo. App. 478; *Railroad Co. v. Mitchell*, 11 Heisk. (Tenn.) 400; *Birmingham, etc., R. Co. v. Hale*, 90 Ala. 8, s. c. 24 Am. St. R. 748,

tending it are so unusual and of such a nature that it could not well have happened without the company being negligent, or when it is caused by something connected with the equipment or operation of the road, over which the company has entire control, without contributory negligence on the part of the passenger, a presumption of negligence on the part of the company usually arises from proof of such facts, in the absence of anything to the contrary, and the burden is then cast upon the company to show that its negligence did not cause the injury.<sup>1</sup> In a recent case, however, it was held that, although the derailment of a train, at a place where the train and track are entirely under the control of the company, raises the presumption of negligence, yet it does not devolve upon the company the duty of showing by a preponderance of the evidence that the accident was not the result of its own negligence, and it is entitled to a verdict if the evidence upon that

and note; *San Antonio, etc., R. Co. v. Robinson*, 73 Texas 277, s. c. 11 S. W. R. 327; note to *Farish v. Reigle*, 62 Am. Dec. 666, 681, 685. See, also, *Davis v. Chicago, etc., R. Co. (Wis.)* 67 N. W. R. 16, 1132.

<sup>1</sup> As to the presumption from derailments and collisions, see *ante*, §§ 1634, 1635. For other cases where presumption has been held to arise, see the elaborate notes to *Barnowski v. Helson*, 15 L. R. A. 33; to *Farish v. Reigle*, 62 Am. Dec. 666, 682, *et seq.*; to *Philadelphia, etc., R. Co. v. Anderson*, 20 Am. St. R. 483, 490, *et seq.* Giving way of bridge or track: *Bedford, etc., R. Co. v. Rainbolt*, 99 Ind. 551; *Louisville, etc., R. Co. v. Snyder*, 117 Ind. 435, s. c. 10 Am. St. R. 60; *Arkansas Midland R. Co. v. Canman*, 52 Ark. 517, s. c. 2 Lewis' Am. R. & Corp. R. 311, and note. Falling object in car: *White v. Boston, etc., R. Co.*, 144 Mass. 404; *Railroad Co. v. Walrath*, 38 Ohio St. 461, s. c. 43 Am. R. 433. Collision

with animal or obstruction on track: *Sullivan v. Philadelphia, etc., R. Co.*, 30 Pa. St. 234, s. c. 72 Am. Dec. 698; *Louisville, etc., R. Co. v. Hendricks*, 128 Ind. 462; *Louisville, etc., R. Co. v. Ritter*, 85 Ky. 368. Injury by servant: *Memphis, etc., R. Co. v. McCool*, 83 Ind. 392; *Kentucky, etc., R. Co. v. Quinkert*, 2 Ind. App. 244, s. c. 28 N. E. R. 338. Breaking of axle or wheel: *Toledo, etc., R. Co. v. Beggs*, 85 Ill. 80; *Hegeman v. Western R. Co.*, 16 Barb. (N. Y.) 353, 356; *Baltimore, etc., R. Co. v. Wightman*, 29 Gratt. (Va.) 431; *Edgerton v. New York, etc., R. Co.*, 39 N. Y. 227. Explosion: *Robinson v. New York Cent. R. Co.*, 20 Blatchf. (U. S. C. C.) 338; *Spear v. Philadelphia, etc., R. Co.*, 119 Pa. St. 61; *Illinois, etc., R. Co. v. Houck*, 72 Ill. 285. This list is not intended to be exhaustive. Other examples and cases will be found in the notes to which we have above referred.

issue, including and giving effect to the presumption, is equally balanced.<sup>1</sup> We have elsewhere called attention to the diversity of opinion that exists upon the question as to the burden of proving contributory negligence or freedom therefrom, and we shall not attempt to review the cases in this connection.<sup>2</sup>

§ 1645. **Contracts limiting liability.**—We have elsewhere considered the question of the right of common carriers of things to limit their liability,<sup>3</sup> and have incidentally treated the subject of limiting liability in connection with the rights and liabilities of sleeping car companies,<sup>4</sup> as well as in connection with the subject of passes,<sup>5</sup> and what has been said applies generally to the questions which it is our immediate purpose to consider. As we have heretofore shown, the authorities unquestionably require the conclusion that where the railroad company is under a duty to carry and it undertakes to carry for hire or reward it can not contract for exemption from negligence.<sup>6</sup> We have elsewhere expressed our opinion that where a purely gratuitous pass is bestowed upon the traveler, no consideration, direct or indirect, being paid, a contract exempting the company from liability is valid.<sup>7</sup> Our reason for this con-

<sup>1</sup> Mexican Cent. R. Co. v. Lauricella, 87 Tex. 277, s. c. 28 S. W. R. 277, 47 Am. St. R. 103.

<sup>2</sup> See authorities reviewed in note to Farish v. Reigle, 62 Am. Dec. 666, 686. See, also, Beach on Contrib. Neg., (2d ed.) § 417, et seq; Patterson Ry. Acc. Law, 435.

<sup>3</sup> Ante, chapter LXI.

<sup>4</sup> Ante, § 1627.

<sup>5</sup> Ante, § 1608.

<sup>6</sup> In addition to the authorities cited in the sections referred to in the preceding notes see, Louisville, etc., R. Co. v. Faylor, 126 Ind. 126; Jacobus v. St. Paul, etc., R. Co., 20 Minn. 125, s. c. 18 Am. R. 360; Rose v. Des Moines, etc., R. Co., 39 Iowa 246; Gulf, etc., R. Co. v. McGown, 65 Tex. 643; Indiana, etc., Co. v. Mundy, 21 Ind. 48; Pennsylvania R. Co. v. McCloskey, 23 Pa.

St. 526; Mobile, etc., R. Co. v. Hopkins, 41 Ala. 486; Cleveland, etc., R. Co. v. Curran, 19 Ohio St. 1; Ohio, etc., R. Co. v. Selby, 47 Ind. 471, s. c. 17 Am. R. 719; Wagner v. Missouri, etc., Co., 97 Mo. 512.

<sup>7</sup> We think that the cases which hold that where a free pass is given a stipulation exempting from liability is invalid erroneously confuse cases where there is a duty to carry with cases where there is no such duty. It seems to us clear that as there is no duty to carry without compensation the reason for the rule invalidating stipulations utterly fails, in cases where no compensation of any kind is provided for or paid. See American Law Review, March, April, 1892. The New York rule is different from that held by the American courts gener-

clusion is that one who receives a pass as a matter of bounty, benevolence or favor must take it upon the terms upon which it is donated.<sup>1</sup> The phase of the question which remains for consideration is as to whether the company can effectively stipulate for exemption in cases where it is not under an obligation to carry. In our judgment an effective and valid contract relieving the company from liability may be made in cases where that obligation does not exist. If the obligation does not exist then the company has a free right of election and it may determine on what terms it will undertake to render service. If it is not under a duty it is free to contract, and if free to contract there is no reason why it may not prescribe such terms as the person with whom it contracts is willing to ac-

ally. *Poucher v. New York, etc., R. Co.*, 49 N. Y. 263; *Bissell v. New York, etc., R. Co.*, 25 N. Y. 442; *Wells v. New York, etc., R. Co.*, 24 N. Y. 181; *Brewer v. New York, etc., R. Co.*, 124 N. Y. 59, s. c. 26 N. E. R. 324. As to the English rule see *McCawley v. Furness R. Co.*, L. R. 8 Q. B. 57; *Gallin v. London, etc., R. Co.*, 10 Q. B. 212; *Alexander v. Toronto, etc., R. Co.*, 33 U. C. Q. B. 474.

<sup>1</sup> *Ante*, § 1608. See, also, *Muldoon v. Seattle, etc., R. Co.*, 7 Wash. 528, s. c. 35 Pac. R. 422; *Illinois, etc., R. Co. v. Read*, 37 Ill. 484; *Muldoon v. Seattle, etc., R. Co.*, 10 Wash. 311, 39 Pac. R. 995; *Annas v. Milwaukee, etc., R. Co.*, 67 Wis. 46, s. c. 30 N. W. R. 282; *Quimby v. Boston, etc., R. Co.*, 150 Mass. 365; *Kinney v. Central, etc., R. Co.*, 34 N. J. Law 513; *Griswold v. New York, etc., R. Co.*, 53 Conn. 371, s. c. 4 Atl. R. 261; *Rogers v. Kennebec, etc., Co.*, 86 Me. 261, 29 Atl. R. 1069. See *Western, etc., Co. v. Bishop*, 50 Ga. 465; *Gardner v. New Haven, etc., R. Co.*, 51 Conn. 143, s. c. 50 Am. R. 12. In the case of *The Louisville, etc., R. Co. v. Keefer*, (Sup. Ct. of Indiana, October 1, 1896) it was held in a strongly reasoned opinion that a

contract between the messenger of an express company and a railroad company limiting the liability of the latter company for injuries received by messengers of the former company is valid. We think the conclusion affirmed in the case to which we have referred is clearly right. Employees riding on a pass are not passengers, and a contract limiting liability is valid. *Texas, etc., Co. v. Smith*, 67 Fed. R. 524; *Howland v. Milwaukee, etc., R. Co.*, 54 Wis. 226; *Kumber v. Junction, etc., R. Co.*, 33 Ohio St. 150; *Ohio, etc., R. Co. v. Tindall*, 13 Ind. 366, s. c. 74 Am. Dec. 279; *McQueen v. Central, etc., R. Co.*, 30 Kan. 689; *Chicago, etc., R. Co. v. Keefe*, 47 Ill. 108; *Abend v. Terre Haute, etc., R. Co.*, 111 Ill. 202, s. c. 53 Am. R. 616; *O'Brien v. Boston, etc., R. Co.*, 138 Mass. 387, 52 Am. R. 279; *New York, etc., R. Co. v. Burns*, 51 N. J. L. 340; *Manville v. Cleveland, etc., R. Co.*, 11 Ohio St. 424, *ante*, § 1578. But see *Pool v. Chicago, etc., R. Co.*, 56 Wis. 227; *State v. Western, etc., R. Co.*, 63 Md. 433; *Washburn v. Nashville, etc., R. Co.*, 3 Head 638, s. c. 75 Am. Dec. 784.

cept. The unfettered right to contract implies the right to agree upon the terms of the contract. There is, it is obvious, an essential difference between cases where there is a duty to carry and cases where there is no such duty, for the existence of the duty restrains the right of contract, but where there is no such duty the right of contract is practically unfettered. In the one case the undertaking to carry is a matter of favor or accommodation rather than of duty,<sup>1</sup> in the other the undertaking to carry is obligatory. It seems entirely fair and just that if an accommodation or favor is desired, which the carrier is at liberty to grant or withhold, the parties should be permitted to make their own agreement and prescribe the terms of their contract.<sup>2</sup> The case is very different where the carrier is under a duty, since it would not then have liberty of action, but where there is no obligatory duty we can see no reason why it may not, by contract, designate the terms and conditions upon which it will perform the desired service.<sup>3</sup> As we have seen, the adjudged cases hold that express messengers are passengers,<sup>4</sup> and while it may be true that express messengers are in a limited sense passengers, yet we think that they can not be regarded as passengers in the broad sense in which persons who pay fare as ordinary travelers journeying from place to place are passengers, for there is a duty to carry such persons, but according to the decisions in the Express Cases, a

<sup>1</sup> This distinction is recognized in the cases which discriminate between the duties of public and private carriers. *Ante*, § 1397. *Robertson v. Old Colony, etc., R. Co.*, 156 Mass. 525, s. c. 31 N. E. R. 650; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Griswold v. New York, etc., R. Co.*, 53 Conn. 371; *Bates v. Old Colony R. Co.*, 147 Mass. 255.

<sup>2</sup> *Hosmer v. Old Colony R. Co.*, 156 Mass. 506, s. c. 31 N. E. R. 652; *Bates v. Old Colony R. Co.*, 147 Mass. 255; *Muldoon v. Seattle, etc., R. Co.*, 10 Wash. 311, 38 Pac. R. 995; *Quimby v. Boston, etc., R. Co.*, 150 Mass. 365, s. c. 23 N. E. R. 205.

<sup>3</sup> We think the statement in the

text is supported by the reasoning in the case of *Hartford, etc., Co. v. Chicago, etc.*, 70 Fed. R. 201, where it was held that in its character of lessor a railroad company might effectively stipulate for exemption from negligence. The opinion in the case referred to discriminates very clearly between cases where the obligation of the company as a carrier requires it to perform service and cases where the acts are not done or required to be done in the capacity of a public carrier.

<sup>4</sup> *Ante*, §§ 1578, 1604. See, also, *Pennsylvania Co. v. Woodworth*, 26 Ohio St. 585; *Yeomans v. Contra Costa, etc., Co.*, 44 Cal. 71.



public carrier is not under a duty to carry for express companies. A railroad company may, as we have elsewhere shown, make special contracts with express companies and may grant to one express company exclusive privileges.<sup>1</sup> As a railroad company is not bound as a public carrier to carry the goods or employes of an express company, it may, upon the principle we have stated, make a valid contract exempting it from liability for injuries to express messengers.<sup>2</sup> There must, according to the decisions, be a contract containing appropriate stipulations, and the contract must be assented to by the messenger.<sup>3</sup> We believe the true doctrine to be that a person who is not entitled to take passage under the rule of law which imposes upon a railroad company the obligation to accept and carry passengers is bound by the stipulations of a contract which he freely enters into in order to obtain passage under special circumstances and conditions, and that, having asked or obtained passage under such circumstances and conditions, and not under the law, he can not successfully invoke the assistance of the law to enable him to avoid his contract.<sup>4</sup>

<sup>1</sup> *St. Louis, etc., R. Co. v. Southern Express Co.*, 117 U. S. 1, s. c. 6 Sup. Ct. R. 542. See *Sargent v. Boston, etc., R. Co.*, 115 Mass. 416; *ante*, § 1394.

<sup>2</sup> *Hosmer v. Old Colony R. Co.*, 156 Mass. 506; *Louisville, etc. R. Co. v. Keefer*, (Ind. Sup. Ct. Oct. 1, 1896.)

<sup>3</sup> *Kenney v. New York, etc., Co.*, 125 N. Y. 422, s. c. 26 N. E. R. 626, 7 N. Y. Sup. 225; *Brewer v. New York, etc., R. Co.*, 124 N. Y. 59. See as to effect of accepting ticket or pass containing conditions, *Rogers v. Kennebec, etc., Co.*, 86 Me. 261, s. c. 29 Atl. R. 1069; *Fonseca v. Cunard Steamship*, 153 Mass. 553, s. c. 27 N. E. R. 665; *Hill v. Boston, etc., R. Co.*, 144 Mass. 284, s. c. 10 N. E. R. 836.

<sup>4</sup> The reasoning of *Stiles, J.*, on *Muldoon v. Seattle, etc., R. Co.*, 7 Wash. 528, s. c. 35 Pac. R. 422, 58 Am. & Eng. R. Cas. 543, is very clear and satisfactory and fully supports the text. As we have said we do not believe that a person is a passenger in

such a sense as to entitle him to exact the performance of the extraordinary duty which a public carrier owes to passengers unless he is on the train and at a place where, under the law, passengers as such have a right to be carried. *Ante*, §§ 1580, 1581, 1582; *Union, etc., R. Co. v. Nichols*, 8 Kan. 505, s. c. 12 Am. R. 475; *Fleming v. Brooklyn, etc., R. Co.*, 1 Abb. New Cas. 433; *Snyder v. Hannibal, etc., R. Co.*, 60 Mo. 413; *Flower v. Pennsylvania R. Co.*, 69 Pa. St. 210, s. c. 8 Am. R. 251. See *McGee v. Missouri, etc., R. Co.*, 92 Mo. 208; *Lake Shore, etc., R. Co. v. Brown*, 123 Ill. 162; *St. Joseph, etc., R. Co. v. Wheeler*, 35 Kan. 185; *International, etc., R. Co. v. Cock*, 68 Tex. 713. In *Wagner v. Missouri, etc., R. Co.*, 97 Mo. 512, there is stated a doctrine which opposes that which we favor but in that case two of the judges, Ray and Sherwood, JJ., dissented.

## CHAPTER LXX.

### BAGGAGE.

- |                                                            |                                                  |
|------------------------------------------------------------|--------------------------------------------------|
| § 1646. Definition.                                        | § 1655. Baggage checks.                          |
| 1647. What things are personal baggage.                    | 1656. Baggage on one train and owner on another. |
| 1648. When a question for the jury and when for the court. | 1657. Rule where baggage is received by mistake. |
| 1649. Merchandise as baggage.                              | 1658. Baggage shipped over connecting roads.     |
| 1650. Excess of baggage.                                   | 1659. Delivery by company—Duty of owner.         |
| 1651. When company is liable as a common carrier.          | 1660. Liability for loss, injury or delay.       |
| 1652. When company is liable as a warehouseman.            | 1661. Limiting liability.                        |
| 1653. Delivery to the company.                             | 1662. Carrier's lien on baggage.                 |
| 1654. Rule where passenger retains custody of baggage.     |                                                  |

§ 1646. **Definition.**—It is somewhat difficult to give an accurate definition of the term baggage. In its broadest sense it denotes those things which a passenger takes with him on his journey, either for his use while in transit or to accomplish the ultimate purpose of his journey, and may include not only things taken for the personal convenience of the passenger, but also merchandise knowingly received and carried along with the passenger as baggage. In its strictest sense it may be defined as meaning those things which passengers of the same class usually or fittingly carry with them for their personal use or convenience on similar journeys.<sup>1</sup> Mr. Law-

<sup>1</sup>Chief Justice Cockburn, in the leading case of *Macrow v. Great Western R. Co.*, L. R. 6 Q. B. 612, gives this definition: "We hold the true rule to be, that whatever the passenger takes with him for his personal

son, in a carefully written article in the *Central Law Journal*, gives the following definition: “ ‘Baggage’ means such goods and chattels as the convenience, or comfort, the taste, the pleasure, or the protection of passengers generally makes it fit and proper for the passenger in question to take with him for his personal use, according to the habits or wants of the class to which he belongs, either with reference to the period of the transit or the ultimate purpose of the journey.”<sup>1</sup> The definitions which we have given will suffice to indicate what baggage is in a general way. The difficult question in cases concerning baggage is not so much what is the definition of baggage in the abstract as what falls within the term baggage, and in the sections following we will consider what things are regarded as personal baggage and what articles of merchandise are properly regarded as baggage in particular cases.

§ 1647. **What things are personal baggage.**—Broadly stated, the rule is that those things are personal baggage which a passenger carries with him for his personal use and convenience on his journey, and during his stay at the place to which he may be going.<sup>2</sup> The difficulty is to determine what things

baggage. This would include, not only articles of apparel, whether for use or ornament, but also the gun case or fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveler, and the takings of which have arisen from the fact of his journeying. On the other hand, the term ‘ordinary baggage’ being thus confined to that which is personal to the passenger and carried for his use or convenience, it follows that what is carried for the purpose of business, such as merchandise or the like, or for larger or ulterior purposes, such as articles of furniture or household goods, would not come within the description of ordinary baggage, unless accepted as such by the carrier.” See,

also, *Hawkins v. Hoffman*, 6 Hill 586; *Bouvier’s Law Dict.*, title “Baggage”; *Railroad Co. v. Fraloff*, 100 U. S. 24.

<sup>1</sup> “A Legal Definition of Baggage,” 38 Cent. L. J. 5, 6.

<sup>2</sup> *Hawkins v. Hoffman*, 6 Hill (N.Y.) 586; *Macrow v. Great Western R. Co.*, L. R. 6 Q. B. 612; *Railroad Co. v. Fraloff*, 100 U. S. 24; *Jordan v. Fall River R. Co.*, 5 Cush. (Mass.) 69; *New Orleans, etc., R. Co. v. Moore*, 40 Miss. 39; *Gleason v. Goodrich Trans. Co.*, 32 Wis. 85; *Metz v. California, etc., R. Co.*, 85 Cal. 329, s. c. 20 Am. St. R. 228. The rule stated in the text is, perhaps, in one respect, a little too narrow, for as we shall hereafter see the articles need not always be for the personal use of himself; he may sometimes be allowed to carry things for members of his family.

are regarded as personal baggage within the rule which we have just stated. In determining whether or not any particular article is baggage many things are to be considered, such as the station which the person who owns the baggage occupies in life, the length and duration of his journey, the period of his stay at the place to which he may be traveling, the purpose of his journey and often the business in which the person may be engaged. We have not attempted to enumerate all the things which may enter as elements in determining the question of what may or may not be personal baggage. We name only a few of the more important elements, enough to illustrate the rule that the surrounding circumstances attending the passenger largely determine the question of what he is entitled to carry as baggage.<sup>1</sup> The station which the passenger occupies in life is, according to the cases, very material, for what would be regarded as baggage of a person occupying a high position in life might not be so regarded where the passenger was

<sup>1</sup> In *Dibble v. Brown*, 12 Ga. 217, s. c. 56 Am. Dec. 460, the court, in considering what was and what was not personal baggage, said: "When we settle down with Judge Story upon the proposition that by baggage is to be understood 'such articles of necessity or personal convenience as are usually carried by passengers for their personal use,' we are still without a rule for determining what articles are included in baggage. For such things as would be necessary to one man would not be necessary to another; articles which would be held but ordinary conveniences by A, might be considered incumbrances by B. One man, from choice or habit, or from educational incapacity to appreciate the comforts or conveniences of life, needs, perhaps, a portmanteau, a change of linen, and an indifferent razor; whilst another, from habit, position and education, is unhappy without all the appliances of comfort

which surround him at home. The quantity and character of baggage must depend very much upon the conditions in life of the traveler—his calling, his habits, his tastes, the length or shortness of his journey, and whether he travels alone or with a family. If we agree further with Judge Story and say that the articles of necessity or of convenience must be such as are usually carried by travelers for their personal use, we are still at fault, because there is in no state of this Union, nor in any part of any one state, any settled usage as to the baggage which travelers carry with them for their personal use. The quantity and character of baggage found to accompany passengers are as various as are the countenances of travelers." See *Hannibal R. Co. v. Swift*, 12 Wall. (U. S.) 262; *Mauritz v. New York, etc., Co.*, 23 Fed. R. 765, 21 Am. & Eng. R. Cas. 286.

from the lower walks of life.<sup>1</sup> The purpose of the journey often determines the question of what is or is not personal baggage, and so does the length of the journey or proposed stay.<sup>2</sup> The business in which the person is engaged is also important for what would be regarded as personal baggage for a person engaged in one line of business would not for a person in an entirely different line of business.<sup>3</sup> It is not necessary that the articles, in order to be considered baggage, should be used on the journey; if they are such as are reasonably necessary for the passenger either while in transit or temporarily staying at a particular place, they will be considered as baggage.<sup>4</sup> The general rule is, that a passenger is only entitled to carry his own things or those of some member of his family as baggage;<sup>5</sup> articles belonging to a stranger will not be considered baggage.<sup>6</sup> It is impossible to notice all the different articles which have been held to be or not to be personal baggage. Among the things which have been held to be personal baggage are sufficient money for the purposes of the passenger's journey,<sup>7</sup>

<sup>1</sup> *Dibble v. Brown*, 12 Ga. 217, 56 Am. Dec. 460; *Railroad Co. v. Fraloff*, 100 U. S. 24; *Merrill v. Grinnell*, 30 N. Y. 594. See *Phelps v. London R. Co.*, 19 C. B. (N. S.) 321; *Coward v. East Tenn. R. Co.*, 16 Lea (Tenn.) 225, s. c. 57 Am. R. 226.

<sup>2</sup> *Hannibal Railroad v. Swift*, 12 Wall. 262; *Merrill v. Grinnell*, 30 N. Y. 594.

<sup>3</sup> See *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85, s. c. 14 Am. R. 716; *Kansas City, etc., R. Co. v. Morrison*, 34 Kan. 502, s. c. 55 Am. R. 252, and authorities cited in the following section.

<sup>4</sup> *Dexter v. Syracuse, etc., R. Co.*, 42 N. Y. 326; *Toledo, etc., R. Co. v. Hammond*, 33 Ind. 379; *Hopkins v. Westcott*, 6 Blatchf. (U. S. C. C.) 64.

<sup>5</sup> *Curtis v. Delaware, etc., R. Co.*, 74 N. Y. 116; *Dexter v. Syracuse, etc., R. Co.*, 42 N. Y. 326, s. c. 1 Am. R.

527; *Jones v. Priester*, 1 Tex. App. (Civ. Cases) 326.

<sup>6</sup> *Weed v. Saratoga, etc., R. Co.*, 19 Wend. 534; *Mississippi, etc., R. Co. v. Kennedy*, 41 Miss. 671; *Chicago, etc., R. Co. v. Boyce*, 73 Ill. 510.

<sup>7</sup> *Hutchings v. Western R. Co.*, 25 Ga. 61; *Fairfax v. New York, etc., R. Co.*, 73 N. Y. 167; *Dunlap v. International, etc., Co.*, 98 Mass. 371; *Toledo, etc., R. Co. v. Hammond*, 33 Ind. 379, 5 Am. R. 221; *Mad River R. Co. v. Fulton*, 20 Ohio 318; *Davis v. Michigan Central R. Co.*, 22 Ill. 278; *Illinois Cent. R. Co. v. Copeland*, 24 Ill. 332; *Jordan v. Fall River R. Co.*, 5 Cush. (Mass.) 69, s. c. 51 Am. Dec. 44. In *Railway Co. v. Berry*, 60 Ark. 433, s. c. 28 L. R. A. 501, it was said: "The carrier is liable, as insurer, for money which the passenger, *bona fide*, includes in his baggage to pay traveling expenses, and for personal use on

clothing,<sup>1</sup> jewelry to be worn on the person,<sup>2</sup> fire-arms,<sup>3</sup> and fishing tackle<sup>4</sup> of sportsmen, and many others, under particular circumstances.<sup>5</sup> Among those things which have been held not to be personal baggage may be mentioned, money in excess of that reasonably sufficient to pay the expenses of the passenger's journey,<sup>6</sup> jewelry not to be worn by the passen-

his journey, provided no more is taken than is necessary or usual for passengers of like station, habits and conditions in life, while on similar journeys." But see *Hickox v. Naugatuck R. Co.*, 31 Conn. 281, s. c. 83 Am. Dec. 143.

<sup>1</sup> *Baltimore R. Co. v. Smith*, 23 Md. 402; *Dibble v. Brown*, 12 Ga. 217; *Brooke v. Pickwick*, 4 Bing. 218; *Munster v. Southeastern R. Co.*, 4 C. B. N. S. 676; *Toledo, etc., R. Co. v. Hammond*, 33 Ind. 379; *Dexter v. Syracuse, etc., R. Co.*, 42 N. Y. 326, s. c. 1 Am. R. 527; *Fairfax v. New York, etc., R. Co.*, 73 N. Y. 167; *Doyle v. Kiser*, 6 Ind. 242; *McGill v. Rowand*, 3 Pa. St. 451, s. c. 45 Am. Dec. 654. Clothing may be cut into patterns and not made up. *Duffy v. Thompson*, 4 E. D. Smith (N. Y.) 178; *Van Horn v. Kermit*, 4 E. D. Smith 453.

<sup>2</sup> *Railroad Co. v. Fraloff*, 100 U. S. 24; *Mauritz v. New York, etc., R. Co.*, 23 Fed. R. 765; *Pettigrew v. Barnum*, 11 Md. 434; *Coward v. East Tennessee, etc., R. Co.*, 16 Lea 225; *Michigan, etc., R. Co. v. Carrow*, 73 Ill. 348. Or a sword of a military officer to be worn when in full dress. *Merrill v. Grinnell*, 30 N. Y. 594.

<sup>3</sup> *Hawkins v. Hoffman*, 6 Hill (N. Y.) 586; *Woods v. Devin*, 13 Ill. 746; *Davis v. Michigan Central R. Co.*, 22 Ill. 278; *Bruty v. Grand Trunk R. Co.*, 32 Up. Can. Q. B. 66; *Parmelee v. Fischer*, 22 Ill. 212, s. c. 74 Am. Dec. 138. But where a grocer is going into the country to buy butter one pistol is all he will be allowed to carry

as baggage. *Chicago, etc., R. Co. v. Collins*, 56 Ill. 212.

<sup>4</sup> *Macrow v. Great Western R. Co.*, L. R. 6 Q. B. 612.

<sup>5</sup> We give a number of illustrative cases of what has been held to be personal baggage. A traveling salesman's catalogue or price-list: *Staub v. Kendrick*, 121 Ind. 226, 40 Am. & Eng. R. Cas. 632; *Gleason v. Goodrich Transportation Co.*, 32 Wis. 85, s. c. 14 Am. R. 716. Books for amusement and entertainment: *Doyle v. Kiser*, 6 Ind. 242. A reasonable quantity of tools for a mechanic: *Porter v. Hildebrand*, 14 Pa. St. 129; *Kansas City, etc., R. Co. v. Morrison*, 34 Kan. 502, 23 Am. & Eng. R. Cas. 481; *Davis v. Cayuga, etc., R. Co.*, 10 How. Pr. (N. Y.) 330. Opera glasses: *Toledo, etc., R. Co. v. Hammond*, 33 Ind. 379. Telescopes for one crossing the ocean: *Cadwalader v. Grand Trunk R. Co.*, 9 L. Canada 169. A carpet: *Minter v. Pacific R. Co.*, 41 Mo. 503. Manuscript and books of a student: *Hopkins v. Westcott*, 6 Blatchf. (U. S.) 64. A pair of gold spectacles: *Newb. Admr.* 494. Stage costumes where the carrier knowingly accepts them as baggage: *Oakes v. Northern Pac. R. Co.*, 20 Ore. 392, 26 Pac. R. 230, s. c. 12 L. R. A. 318. As to bicycles, see "Bicycles as Baggage," 43 Cent. L. J. 363.

<sup>6</sup> *Pfister v. Central, etc., R. Co.*, 70 Cal. 169; *Dunlap v. International, etc., Co.*, 98 Mass. 371; *Phelps v. London, etc., R. Co.*, 19 C. B. N. S. 321; *Hickox v. Naugatuck, etc., R. Co.*, 31

ger,<sup>1</sup> bed clothing and articles of furniture and bedding not to be used on the journey<sup>2</sup> and many others.<sup>3</sup>

**§ 1648. When a question for the jury and when for the court.**

—There is apparently some slight conflict among the authorities as to whether the question of what articles of property are personal baggage is one of law or one of fact. The true rule is

Conn. 281; *Jordan v. Fall River R. Co.*, 5 Cush. (Mass.) 69; *Cincinnati, etc., R. Co. v. Marcus*, 38 Ill. 219; *First National Bank v. Marietta, etc., R. Co.*, 20 Ohio St. 259; *Illinois, etc., R. Co. v. Copeland*, 24 Ill. 332; *Whitmore v. Steamboat Caroline*, 20 Mo. 513; *Hillis v. Chicago, etc., R. Co.*, 72 Iowa 228; *Rome, etc., R. Co. v. Wimberly*, 75 Ga. 316. But where the passenger informs the agent of the company that a trunk which he tenders as baggage contains a large sum of money, more than necessary for the expenses of the passenger, and the agent accepts it as baggage, the carrier will be liable for its loss. *Railway Co. v. Berry*, 60 Ark. 433. A company may rightfully refuse to accept \$90,000 as baggage. *Pfister v. Central, etc., R. Co.*, 70 Cal. 169, s. c. 11 Pac. R. 686, 27 Am. & Eng. R. Cas. 246.

<sup>1</sup> *Michigan, etc., R. Co. v. Carrow*, 73 Ill. 348; *The Ionic*, 5 Blatch. (U. S.) 538; *Belfast, etc., R. Co. v. Keys*, 9 H. L. 556; *Metz v. California, etc., R. Co.*, 85 Cal. 329, s. c. 24 Pac. R. 610.

<sup>2</sup> *Mauritz v. New York, etc., R. Co.*, 23 Fed. R. 765, s. c. 21 Am. & Eng. R. Cas. 286; *Connolly v. Warren*, 106 Mass. 146; *Texas, etc., R. Co. v. Ferguson*, 1 Tex. App. (Civil Cases) 724, s. c. 9 Am. & Eng. R. Cas. 395; *Macrow v. Great Western R. Co.*, L. R. 6 Q. B. 612. But a reasonable amount may be under some circumstances: *Ouimit v. Henshaw*, 35 Vt. 605, s. c. 84 Am. Dec. 646; *Glovinsky v. Cunnard, etc., Co.*, 24 N. Y. Supp. 136.

<sup>3</sup> Silver knives, forks and spoons: *Giles v. Fauntleroy*, 13 Md. 126; *Orange County Bank v. Brown*, 9 Wend. (N. Y.) 85; *Hawkins v. Hoffman*, 6 Hill (N. Y.) 586. A sacque, muff and silver napkin rings carried by a man: *Chicago, etc., R. Co. v. Boyce*, 73 Ill. 510, s. c. 24 Am. R. 268. Deeds and documents: *Phelps v. London, etc., R. Co.*, 19 C. B. N. S. 321; *Thomas v. Great Western R. Co.*, 14 Up. Can. Q. B. 389; *Masonic Regalia: Nevins v. Bay State S. Co.*, 4 Bosw. (N. Y.) 225. Pencil sketches made by an artist: *Mytton v. Midland R. Co.*, 28 L. J. Exch. 385. A child's hobby horse: *Hudston v. Midland R. Co.*, L. R. 4 Q. B. 366, 38 L. J. R. (Q. B.) 213. Dogs: *Honeyman v. Oregon, etc., R. Co.*, 13 Ore. 352, s. c. 10 Pac. R. 628; but compare *Cantling v. Hannibal, etc., R. Co.*, 54 Mo. 385. Masquerade costumes: *Michigan, etc., R. Co. v. Oehm*, 56 Ill. 293. A silk bed quilt carried in a lady's trunk: *St. Louis, etc., R. Co. v. Hardway*, 17 Ill. App. 321. Ladies' jewelry carried by a man: *Metz v. California, etc., R. Co.*, 85 Cal. 329, 44 Am. & Eng. R. Cas. 433. A concertina: *Bruty v. Grand Trunk R. Co.*, 32 U. C. Q. B. 66. Handcuffs: *Bomar v. Maxwell*, 9 Humph. (Tenn.) 620, s. c. 51 Am. Dec. 682. Under other circumstances, however, some of these things might properly have been considered as baggage.

as we believe, that it is usually for the jury to say, under instructions from the court and subject to the right of the court to correct abuses, what articles are or are not personal baggage in the particular case.<sup>1</sup> There are, however, as we have intimated, some authorities which hold that the question is one of law.<sup>2</sup> What is a reasonable amount of baggage or how much of any particular article shall be regarded as baggage is, ordinarily, a question for the jury;<sup>3</sup> but where the facts are undisputed and there can be no reasonable difference of opinion, upon the subject, we think it may well become a question for the court to determine not only what is baggage in a general sense but also whether the particular articles should be regarded as baggage in the particular instance.<sup>4</sup>

<sup>1</sup>Texas, etc., R. Co. v. Ferguson, 1 Tex. App. (Civ. Cas.) 724, 9 Am. & Eng. R. Cas. 395; Fairfax v. New York Central R. Co., 73 N. Y. 167; Brock v. Gale, 14 Fla. 523, s. c. 14 Am. R. 356; Mauritz v. New York, etc., R. Co., 23 Fed. R. 765; Oakes v. Northern Pac. R. Co., 20 Ore. 392, s. c. 47 Am. & Eng. R. Cas. 437, 26 Pac. R. 230, 12 L. R. A. 318; Dibble v. Brown, 12 Ga. 217; Ouimit v. Henshaw, 35 Vt. 605. It was said in Railroad Co. v. Fraloff, 100 U. S. 24: "Whether they were such articles in quantity and value as passengers of like station and under like circumstances ordinarily or usually carry for their personal use, and to subserve their convenience, gratification, or comfort while traveling, was not a pure question of law for the sole or final determination of the court, but a question of fact for the jury, under proper guidance from the court as to the law governing such cases."

<sup>2</sup>See Jones v. Priester, 1 Tex. App. (Civ. Cas.) 326; Humphreys v. Perry, 148 U. S. 627, s. c. 13 Sup. Ct. R. 711; Connolly v. Warren, 106 Mass. 146; Kansas, etc., R. Co. v. Morrison, 34 Kan. 502.

<sup>3</sup>Kansas City, etc., R. Co. v. Morrison, 34 Kan. 502, s. c. 23 Am. & Eng. R. Cas. 481; Railroad Co. v. Fraloff, 100 U. S. 24. Cases illustrative of the rule are those which hold that it is for the jury to say how much money carried by the passenger is reasonably necessary for the expenses of the journey. Railway Co. v. Berry, 60 Ark. 433, s. c. 28 L. R. A. 501; Jones v. Priester, 1 Tex. App. (Civ. Cas.) 326; Merrill v. Grinnell, 30 N. Y. 594.

<sup>4</sup>To take an extreme case, we suppose that if a woman, going from a neighboring town to Brooklyn to attend services at church in the daytime, should carry with her half a dozen revolvers and a bowie knife, any court would correctly say that they were not baggage, and that a court might also well hold that if a man should carry half a dozen revolvers, ostensibly for his own protection and sole use while traveling in a civilized and peaceable country, no more than one, or at the most, two of them could be considered as baggage. See Chicago, etc., R. Co. v. Collins, 56 Ill. 212. See, also, Humphreys v. Perry, 148 U. S. 627, s. c. 13 Sup. Ct. R. 711; Hutchinson on Carriers, (2d ed.) § 688.



§ 1649. **Merchandise as baggage.**—Merchandise is often carried as baggage, but the carrier is not always liable for it as such. The general rule is that the carrier is not liable for merchandise shipped as baggage, in the absence of conversion or gross negligence, unless it had notice that such merchandise was being so shipped and accepted it as such.<sup>1</sup> Thus where the trunk of a passenger contains both personal baggage and also merchandise, but the carrier has no notice that merchandise is in the passenger's trunk, it will be liable only for the loss of the personal baggage and not for the merchandise.<sup>2</sup> Where a traveling agent for a wholesale jewelry house checked a trunk containing a large quantity of jewelry as baggage and the trunk was destroyed by fire, it was held that the company was not liable for its loss in the absence of notice of its contents at the time it was accepted as baggage.<sup>3</sup> Where a passenger presents a trunk to be carried as baggage and there

<sup>1</sup> *Collins v. Boston, etc., R. Co.*, 10 Cush. 506; *Stimson v. Connecticut, etc., R. Co.*, 98 Mass. 83; *Hawkins v. Hoffman*, 6 Hill 586; *Belfast, etc., Railway Co. v. Keys*, 9 H. L. Cas. 556; *Great Northern R. Co. v. Shepherd*, 8 Exch. 30; *Blumantle v. Fitchburg R. Co.*, 127 Mass. 322, s. c. 34 Am. Rep. 376; *Chamberlain v. Western Trans. Co.*, 45 Barb. (N. Y.) 218; *Simpson v. New York, etc., R. Co.*, 38 N. Y. Supp. 341; *Cahill v. London, etc., R. Co.*, 10 Com. B. (N. S.) 154; *Mississippi, etc., R. Co. v. Kennedy*, 41 Miss. 671; *Pennsylvania Co. v. Miller*, 35 Ohio St. 541, s. c. 35 Am. Rep. 620; *Toledo, etc., R. Co. v. Ambach*, 10 Ohio Cir. Ct. R. 490; *Michigan, etc., R. Co. v. Oehm*, 56 Ill. 293; *Spooner v. Hannibal, etc., R. Co.*, 23 Mo. App. 403. Liability, however, may exist where there is gross negligence. *Michigan, etc., R. Co. v. Carrow*, 73 Ill. 348; *Smith v. Boston, etc., R. Co.*, 44 N. H. 325.

<sup>2</sup> *Simpson v. New York, etc., R. Co.*,

38 N. Y. Supp. 341; *Humphreys v. Perry*, 148 U. S. 627, 13 Sup. Ct. R. 711, 54 Am. & Eng. R. Cas. 29, reversing *Central Trust Co. v. Wabash, etc., R. Co.*, 39 Fed. Rep. 417, s. c. 40 Am. & Eng. R. Cas. 636; *Wunsch v. Northern Pac. R. Co.*, 62 Fed. R. 878.

<sup>3</sup> *Humphreys v. Perry*, 148 U. S. 627, s. c. 13 Sup. Ct. R. 711. See, also, *Alling v. Boston, etc., R. Co.*, 126 Mass. 121; *Blumantle v. Fitchburg R. Co.*, 127 Mass. 322; *Michigan, etc., R. Co. v. Carrow*, 73 Ill. 348; *Haines v. Chicago, etc., Ry. Co.*, 29 Minn. 160, 12 N. W. Rep. 447. In *Humphreys v. Perry*, 148 U. S. 627, it was shown that it was usual to carry trunks in the manner referred to, but it was also shown that no company would do so when it had notice of their contents. It was held that proof of the custom would not render the carrier liable. *Blumenthal v. Maine, etc., R. Co.*, 79 Me. 550, 34 Am. & Eng. R. Cas. 247, is to the same effect on point of custom.

is nothing about the trunk to indicate that it contains merchandise the carrier is not bound to inquire as to the contents, but may assume that it contains only the personal baggage of the passenger.<sup>1</sup> The rule is that the passenger is entitled to have carried, as baggage free of charge, only such things as are personal baggage,<sup>2</sup> but if the carrier itself accepts articles of merchandise and transports them as baggage it will be liable for their loss,<sup>3</sup> although no compensation other than the ticket purchased by the passenger was paid for their transportation.<sup>4</sup> It is also said that knowledge on the part of the carrier that the baggage contains merchandise may be acquired by observing the baggage, where its nature is obvious, or by notice from the passenger to that effect.<sup>5</sup> Merchandise is ordinarily carried as baggage under a contract not contained in the ticket purchased by the passenger.<sup>6</sup> In the prosecution of a great many kinds of business, such as the sale of costly articles, taking or-

<sup>1</sup> *Haines v. Chicago, etc., R. Co.*, 29 Minn. 160, 12 N.W. Rep. 447, approved in *Humphreys v. Perry*, 148 U. S. 627, 13 Sup. Ct. Rep. 711, in which the case of *Kuter v. Michigan, etc., R. Co.*, 1 Biss. 35, on this point was criticised. See, also, *Cahill v. London R. Co.*, 10 Com. B. (N. S.) 154. Held a question for the jury as to whether the agent had such knowledge in *Bowler, etc., Co. v. Toledo, etc., R. Co.*, 10 Ohio Circ. Ct. R. 272.

<sup>2</sup> *Pfister v. Central, etc., R. Co.*, 70 Cal. 169, 11 Pac. Rep. 686; *Blumenthal v. Maine, etc., R. Co.*, 79 Me. 550, 34 Am. & Eng. R. Cas. 247; *Wilson v. Grand Trunk Railway*, 56 Me. 60; *Hoeger v. Chicago, etc., R. Co.*, 63 Wis. 100, 23 N. W. R. 435; *Oakes v. Northern, etc., R. Co.*, 20 Ore. 39, 26 Pac. Rep. 230, 4 Lewis R. R. & Corp. R. 571; *Minter v. Pacific R. Co.*, 41 Mo. 503; *Jacobs v. Tutt*, 33 Fed. Rep. 412; *Stoneman v. Erie R. Co.*, 52 N. Y. 429; *Hellman v. Holladay*, 1 Woolw. (C. C.) 365; *Sloman v. Great Western*

*R. Co.*, 6 Hun 546; *Haines v. Chicago, etc., R. Co.*, 29 Minn. 160; *Texas, etc., R. Co. v. Cupps*, (Tex.) 16 Am. & Eng. R. Cas. 118; *Chicago, etc., R. Co. v. Conklin*, 32 Kan. 55, 3 Pac. Rep. 762; *Hannibal R. Co. v. Swift*, 12 Wall. 262; *Strouss v. Wabash, etc., R. Co.*, 17 Fed. Rep. 209; *Waldron v. Chicago, etc., R. Co.*, 1 Dak. 351, 46 N. W. Rep. 456.

<sup>3</sup> *Butler v. Hudson River R. Co.*, 3 E. D. Smith 571; *Hamburg, etc., Packet Co. v. Gattman*, 127 Ill. 598; *Ross v. Missouri, etc., R. Co.*, 4 Mo. App. 582.

<sup>4</sup> *Oakes v. Northern, etc., R. Co.*, 20 Ore. 39, 26 Pac. Rep. 230; *Great Northern R. Co. v. Shepherd*, 8 Exch. 30; *Macrow v. Great Western R. Co.*, L. R. 6 Q. B. 612.

<sup>5</sup> *Thompson on Carriers*, 523. But actual knowledge is usually required.

<sup>6</sup> See *Millard v. Missouri, etc., R. Co.*, 86 N. Y. 441, s. c. 6 Am. & Eng. R. Cas. 311.

ders and the like by commercial travelers, it is necessary that they carry with them, either for sale direct or for samples, different articles of merchandise. In such cases carriers usually accept such merchandise and carry it as baggage, charging a compensation therefor. Under such contracts the company becomes a carrier of goods for hire and is subject to all the liabilities of a common carrier, that is, it is an insurer of the goods carried and is liable for their loss or damage,<sup>1</sup> unless such loss or damage was caused by the act of God, the public enemy or the inherent nature of the goods themselves, or unless there is a valid contract limiting its liability. It has been held that one who, by the exercise of ordinary care, diligence and intelligence, could have known that the checking by a station agent or baggage-master of cases or trunks containing merchandise was prohibited by a rule of the carrier, can not recover the value of the same if lost or destroyed,<sup>2</sup> and that notice to the baggage-master that trunks offered and received as baggage contain merchandise will not bind the carrier to transport it as baggage in the absence of authority in the baggage-master to make a special agreement to that effect.<sup>3</sup> But the last proposition seems to be contrary to the prevailing rule which we have already stated, and it has been held by other courts that a baggage-master is not acting outside the scope of his employment and beyond his implied authority in receiving extra baggage, or merchandise as baggage, although contrary to his instructions or the rules of the company, which are unknown to the passenger.<sup>4</sup>

<sup>1</sup> Millard *v.* Missouri, etc., R. Co., 86 N. Y. 441; Oakes *v.* Northern Pac. R. Co., 20 Ore. 39, 26 Pac. Rep. 230; Perley *v.* New York, etc., R. Co., 65 N. Y. 374; Jacobs *v.* Tutt, 33 Fed. R. 412.

<sup>2</sup> Weber Co. *v.* Chicago, etc., R. Co., (Iowa) 60 N. W. R. 637.

<sup>3</sup> Blumantle *v.* Fitchburg R. Co., 127 Mass. 322; Alling *v.* Boston, etc., R. Co., 126 Mass. 121; Jordan *v.* Fall River R. Co., 5 Cush. (Mass.) 69.

See, also, Bomar *v.* Maxwell, 9 Humph. (Tenn.) 620; Blumenthal *v.* Maine, etc., R. Co., 79 Me. 550, s. c. 11 Atl. R. 605.

<sup>4</sup> Railway Co. *v.* Berry, 60 Ark. 433, s. c. 30 S. W. R. 764, 28 L. R. A. 501; Strouss *v.* Wabash, etc., R. Co., 17 Fed. R. 209; Minter *v.* Pacific R. Co., 41 Mo. 503; Waldron *v.* Chicago, etc., R. Co., 1 Dak. 351, s. c. 46 N. W. R. 456. See, also, Isaacson *v.* New York, etc.,

§ 1650. **Excess of baggage.**—Railroad companies no doubt may, and usually do, make reasonable regulations as to the amount or weight of baggage which they will carry for each passenger.<sup>1</sup> In some states, there are statutory provisions fixing the amount, and for extra baggage or any excess in weight over that amount the company has the right to stipulate for compensation.<sup>2</sup> The mere payment of extra compensation on account of overweight of baggage does not necessarily convert it into freight.<sup>3</sup> Of course, as shown in the preceding section, where it is not properly baggage—but merchandise, for instance—and the company is notified of its character, the carrier's liability on accepting it with the extra compensation may be the same as for freight.

§ 1651. **When company is liable as a common carrier.**—Where there is a liability on the part of a carrier for baggage the liability is sometimes that of a common carrier and sometimes that of a warehouseman. The general rule is that the carrier is liable for baggage as a common carrier, that is, it is liable for the loss or injury to the baggage at all events,<sup>4</sup> except where

R. Co., 94 N. Y. 278; Camden, etc., R. Co. v. Baldauf, 16 Pa. St. 67; Jacobs v. Tutt, 33 Fed. R. 412; Hannibal R. Co. v. Swift, 12 Wall. (U. S.) 262; Great Northern R. Co. v. Shepherd, 8 Exch. 30, s. c. 7 Eng. Ry. & Canal Cas. 310; Kansas City, etc., R. Co. v. Higdon, 94 Ala. 286, 14 L. R. A. 515, and note; Hutchinson on Carriers, (2d ed.) § 688a.

<sup>1</sup> See Norfolk, etc., R. Co. v. Irvine, 84 Va. 553; Railroad Co. v. Fraloff, 100 U. S. 24; The Majestic, 60 Fed. R. 624.

<sup>2</sup> Gulf, etc., R. Co. v. Ions, 3 Tex. Civ. App. 619, s. c. 22 S. W. R. 1011, 1012; Dibble v. Brown, 12 Ga. 217, s. c. 56 Am. Dec. 460, 468. In the first case just cited it is said that all tickets are purchased with a knowledge of the statute, and that a demand for pay for extra baggage is neither a violation, change nor substitute of the

original contract made in the purchase of the ticket.

<sup>3</sup> Hamburg-American Packet Co. v. Gattman, 127 Ill. 598, s. c. 20 N. E. R. 662, 664. But see Sloman v. Great Western R. Co., 67 N. Y. 208.

<sup>4</sup> Dibble v. Brown, 12 Ga. 217; Camden, etc., Co. v. Burke, 13 Wend. 611; Christie v. Griggs, 2 Camp. 79; Brooke v. Pickwick, 4 Bing. 218; Georgia, etc., R. Co. v. Thompson, 86 Ga. 327; Peterson v. Chicago, etc., R. Co., 80 Iowa 92; Shaw v. Northern Pacific R. Co., 40 Minn. 144; Coskery v. Nagle, 83 Ga. 696; Oakes v. Northern Pacific R. Co., 20 Ore. 392, s. c. 26 Pac. R. 230, 23 Am. St. R. 126, 47 Am. & Eng. R. Cas. 437; Staub v. Kendrick, 121 Ind. 226; Kansas City, etc., R. Co. v. Patten, (Kan. App.) 45 Pac. R. 108; Leavenworth, etc., R. Co. v. Maris, 16 Kan. 333.

the loss or damage is caused by the act of God, the act of the owners, or inevitable accident, or by public enemies.<sup>1</sup> The liability of the company as a common carrier begins, as a rule, at the time the baggage is delivered to it for transportation unless the time of such delivery be an unreasonable length of time before the owner's intended departure.<sup>2</sup> In order that the liability as a common carrier should exist it is not always necessary that the passenger should have purchased a ticket, nor that he should even make the journey which he intends to make. As persons often become entitled to the rights of passengers before the purchase of a ticket, so the liability of the carrier for baggage often begins before the purchase of a ticket or even before the company becomes liable to the owner of the baggage as a passenger.<sup>3</sup> Where a person in good faith intends to take passage on a railway train or the like and delivers his baggage to the company a reasonable time in advance of the anticipated journey, it seems that the company will be liable for such baggage as a common carrier from the time of such delivery and acceptance.<sup>4</sup> And in such cases the company may be liable although the person does not purchase a ticket or make the proposed journey, as for instance, where he is prevented by so doing by the loss or destruction of the baggage before the journey begins.<sup>5</sup>

<sup>1</sup>*Strouss v. Wabash, etc., R. Co.*, 17 Fed. R. 209; *Long v. Pennsylvania R. Co.*, 147 Pa. St. 343, s. c. 23 Atl. R. 459; *Pennsylvania R. Co. v. McKinney*, 124 Pa. St. 462.

<sup>2</sup>*Lake Shore, etc., R. Co. v. Foster*, 104 Ind. 293; *Illinois, etc., R. Co. v. Tronstine*, 64 Miss. 834, s. c. 31 Am. & Eng. R. Cas. 99; *Fitchburg, etc., R. Co. v. Hanna*, 6 Gray (Mass.) 539; *Michigan, etc., R. Co. v. Shurtz*, 7 Mich. 515. In *Shaw v. Northern, etc., R. Co.*, 40 Minn. 144, s. c. 41 N. W. R. 548, it was held that this liability attached at the time of delivery for transportation although for the convenience of the carrier, the passenger consented that it need not be for-

warded upon the same or the next train.

<sup>3</sup>*Hickox v. Naugatuck R. Co.*, 31 Conn. 281; *Lake Shore, etc., R. Co. v. Foster*, 104 Ind. 293; *Green v. Milwaukee, etc., R. Co.*, 41 Iowa 410; *Van Horn v. Kermit*, 4 E. D. Smith (N. Y.) 453.

<sup>4</sup>*Hickox v. Naugatuck R. Co.*, 31 Conn. 281; *Camden, etc., Co. v. Belknap*, 21 Wend. 354; *Rogers v. Long Island, etc., R. Co.*, 1 T. & C. (N. Y.) 396. But see *Goodbar v. Wabash R. Co.*, 53 Mo. App. 434; *Little Rock, etc., R. Co. v. Hunter*, 42 Ark. 200, s. c. 18 Am. & Eng. R. Cas. 527.

<sup>5</sup>"Suppose a party at a railway station places his baggage in posses-

A company may, however, adopt a regulation that it shall not be liable for baggage as a common carrier until the owner has purchased a ticket. Such a regulation is reasonable but it has been held that unless it is regularly enforced it does not bind a person delivering baggage to the carrier before the purchase of a ticket.<sup>1</sup> The liability of a company as a common carrier in respect to baggage terminates when the company has transported the baggage to its destination and given the owner a reasonable time and opportunity to claim and take it away.<sup>2</sup>

§ 1652. When company is liable as a warehouseman.—We have seen that during transit and for a reasonable time after the arrival of baggage at its destination, the liability of a company is that of a common carrier.<sup>3</sup> At the expiration of a reasonable time after baggage reaches its destination the liability as a common carrier ceases,<sup>4</sup> but it does not follow that from

sion of the baggage-master and procures a check, and proceeds to purchase a ticket, but before he makes the purchase his baggage is stolen, in consequence of which he is compelled to forego the journey, and determines not to buy a ticket, may he not recover on account of the loss of his baggage? \* \* \* The true question is not what the party might do, but what, in view of all the circumstances disclosed, did he intend to do?" *Green v. Milwaukee, etc., R. Co.*, 41 Iowa 410.

<sup>1</sup> *Lake Shore, etc., R. Co. v. Foster*, 104 Ind. 293.

<sup>2</sup> *Hoeger v. Chicago, etc., R. Co.*, 63 Wis. 100, s. c. 53 Am. R. 271; *Toledo, etc., R. Co. v. Tapp*, 6 Ind. App. 304; *Mote v. Chicago, etc., R. Co.*, 27 Iowa 22, s. c. 1 Am. R. 212; *Dinenny v. New York, etc., R. Co.*, 49 N. Y. 546; *Louisville, etc., R. Co. v. Mahan*, 8 Bush (Ky.) 184; *Bartholomew v. St. Louis, etc., R. Co.*, 53 Ill. 227; *Burnell v. New York, etc., R. Co.*, 45 N. Y. 184; *Chicago, etc., R. Co. v. Boyce*,

73 Ill. 510; *Vineberg v. Grand Trunk R. Co.*, 13 Ont. App. Rep. 93, s. c. 27 Am. & Eng. R. Cas. 271. The rule is thus stated in the case of *Kansas City, etc., R. Co. v. Patten*, (Kan. App.) 45 Pac. R. 108: "A common carrier of passengers for hire is an insurer of the safety of the passenger's baggage intrusted to it, during transit, and for a reasonable time after its arrival at the place of destination, in order to allow the passenger time to receive and remove it. *Leavenworth, etc., R. Co. v. Maris*, 16 Kan. 333. But the liability of the carrier terminates when the baggage has arrived at its destination, and has remained there a reasonable time, sufficient to allow the owner to receive and remove it from the carrier's premises."

<sup>3</sup> *Ante*, § 1651.

<sup>4</sup> *Mote v. Chicago, etc., R. Co.*, 27 Iowa 22; *Patscheider v. Great Western R. Co.*, L. R. 3 Ex. Div. 153; *Dinenny v. New York, etc., R. Co.*, 49 N. Y. 546; *Louisville, etc., R. Co. v. Mahan*, 8 Bush 184; *Cohen v. St. Louis*,

that time there is no liability whatever. If the owner of baggage does not call for it within a reasonable time after it reaches the destination a duty rests upon the carrier to store it and care for it a reasonable time until called for.<sup>1</sup> The rule is that after the baggage has been held for a reasonable time after its arrival, and the owner does not call for it, the liability as a common carrier ceases and the liability of a warehouseman for hire begins.<sup>2</sup> The measure of duty resting upon the carrier as warehouseman is that of reasonable care, and in such cases it is only liable for loss or injury to the baggage which results from its actual negligence.<sup>3</sup> In providing a place for storing the baggage the carrier is bound to exercise only such a degree of care as would be used by a reasonably prudent man under the circumstances; it is not bound to provide a place either fire or burglar proof.<sup>4</sup> The test for determining liability is whether or not there was negligence.<sup>5</sup> In

etc., R. Co., 59 Mo. App. 66; and other authorities cited in the last note to the preceding section.

<sup>1</sup> *Wald v. Louisville, etc., R. Co.*, 92 Ky. 645, 58 Am. & Eng. R. Cas. 123; *St. Louis, etc., R. Co. v. Hardway*, 17 Ill. App. 321; *Galveston, etc., R. Co. v. Smith*, 81 Tex. 479; *Matteson v. New York, etc. R. Co.*, 76 N. Y. 381.

<sup>2</sup> *Laffrey v. Grummond*, 74 Mich. 186, s. c. 16 Am. St. R. 624; *Galveston, etc., R. Co. v. Smith*, 81 Tex. 479, 17 S.W.R. 133; *Quimit v. Henshaw*, 35 Vt. 605; *Ross v. Missouri, etc., R. Co.*, 4 Mo. App. 582; *Kansas City, etc., R. Co. v. Patten*, (Kan. App.) 45 Pac. R. 108; *Leavenworth, etc., R. Co. v. Maris*, 16 Kan. 333; *Wald v. Louisville, etc., R. Co.*, 92 Ky. 645, 58 Am. & Eng. R. Cas. 123; *Geo. F. Ditman, etc., Co. v. Keokuk, etc., R. Co.*, 91 Iowa 416, 59 N. W. R. 257; *Texas, etc., R. Co. v. Capps*, 2 Tex. App. (Civ. Cas.) 35; *Louisville, etc., R. Co. v. Mahan*, 8 Bush 184; *Nealand v. Boston, etc., R. Co.*, 161 Mass. 77, 36 N. E. R. 592.

<sup>3</sup> *Kansas City, etc., R. Co. v. Patten*, (Kan. App.) 45 Pac. R. 108; *Galveston, etc., R. Co. v. Smith*, 81 Tex. 479, 17 S.W. R. 133; *Chicago, etc., Railway Co. v. Boyce*, 73 Ill. 510; *Hoeger v. Chicago, etc., Railroad Co.*, 63 Wis. 100, 23 N. W. R. 435.

<sup>4</sup> *Kansas City, etc., R. Co. v. Patten*, (Kan. App.) 45 Pac. R. 108; *Wald v. Louisville, etc., R. Co.*, 92 Ky. 645, 58 Am. & Eng. R. Cas. 123. Whether reasonably safe, held a question for the jury in *Nealand v. Boston, etc., R. Co.*, 161 Mass. 67, s. c. 36 N. E. R. 592.

<sup>5</sup> *Chicago, etc., R. Co. v. Fairclough*, 52 Ill. 106; *Georgia, etc., R. Co. v. Thompson*, 86 Ga. 327, s. c. 12 S. E. R. 640; *Curtis v. Delaware, etc., R. Co.*, 74 N. Y. 116. There is no presumption of negligence against a warehouseman. It must appear from the evidence. *Wald v. Louisville, etc., R. Co.*, 92 Ky. 645, 58 Am. & Eng. R. Cas. 123; *Texas, etc., R. Co. v. Capps*, (Tex.) 16 Am. & Eng. R. Cas. 118; *Kahn v. Atlantic, etc., R.*

some cases the liability of the carrier is not even that of a warehouseman for hire. The liability may sometimes be only that of a gratuitous bailee. Thus, where on the arrival of baggage and the owner at the destination the owner calls for his baggage and is given an opportunity to remove it, but requests that the company keep and care for it for a while, the company then becomes a mere gratuitous bailee and is liable only for what is known as gross negligence.<sup>1</sup> In order, however, to reduce the liability of the company to that of a warehouseman the company must give the owner reasonable opportunity to demand his baggage and take it away.<sup>2</sup> If on the arrival of baggage the company immediately stores it and locks its baggage room so that the owner can not secure the baggage, the liability of a common carrier still continues and does not terminate until reasonable opportunity is given the owner to remove his baggage.<sup>3</sup> The carrier can not terminate or change its liability by its own wrong. What is a reasonable time in which to call for and remove baggage has been held, where the facts are undisputed, to be one of law,<sup>4</sup> but where the facts are disputed it is a mixed question of law and fact.<sup>5</sup>

Co., 115 N. Car. 638, s. c. 20 S. E. R. 169.

<sup>1</sup> *Minor v. Chicago, etc., R. Co.*, 19 Wis. 40; *Little Rock, etc., R. Co. v. Hunter*, 42 Ark. 200, s. c. 18 Am. & Eng. R. Cas. 527. See, *Mortland v. Philadelphia, etc., R. Co.*, 81 Hun 473, s. c. 30 N. Y. Supp. 1021; *Galveston, etc., R. Co. v. Smith*, (Tex. Civ. App.) 24 S. W. R. 668.

<sup>2</sup> *Toledo, etc., R. Co. v. Tapp*, 6 Ind. App. 304. See, also, *George F. Ditman Boot and Shoe Co. v. Keokuk, etc., R. Co.*, 91 Iowa 614, s. c. 59 N. W. R. 257. It was held in a recent case that the company, in ejecting a passenger, had no right to put his baggage off in a place where it would be injured, and that he had a right to use such force as was necessary to prevent its injury. *Gulf, etc., R. Co.*

*v. Moody*, (Tex. Civ. App.) 30 S. W. R. 574.

<sup>3</sup> *Toledo, etc., R. Co. v. Tapp*, 6 Ind. App. 304; *Georgia R., etc., Co. v. Phillips*, 93 Ga. 801, s. c. 20 S. E. R. 646.

<sup>4</sup> *Burgevin v. New York, etc., R. Co.*, 69 Hun 479, 23 N. Y. Supp. 415; *Toledo, etc., R. Co. v. Tapp*, 6 Ind. App. 304.

<sup>5</sup> *Toledo, etc., R. Co. v. Tapp*, 6 Ind. App. 304; *Louisville, etc., R. Co. v. Mahan*, 8 Bush 184; *Mote v. Chicago, etc., R. Co.*, 27 Iowa 22; *Brown v. Canadian Pac. R. Co.*, 3 Manitoba R. 496. See, generally, as illustrative cases of what is a reasonable time for the removal of baggage, *Roth v. Buffalo, etc., R. Co.*, 34 N. Y. 548; *Jones v. Norwich, etc., R. Co.*, 50 Barb. (N.Y.) 193.



§ 1653. **Delivery to the company.**—In order that any liability may arise on the part of a carrier in respect to baggage it is necessary that there should be a delivery of the baggage to the carrier.<sup>1</sup> Unless there is a delivery there is no liability.<sup>2</sup> The general rule is that there must be a delivery and acceptance by the carrier, although there may sometimes be a constructive acceptance.<sup>3</sup> Where delivery has been made and there is an actual acceptance by the carrier there is no question as to the responsibility of the company. But where there is no actual acceptance the question is what is a sufficient delivery to make the acceptance constructive so as to bind the carrier. Where baggage was left on a dock near a steamboat and the person leaving the baggage called the attention of an employe on the boat to it, who answered "all right," it was held that the delivery was sufficient.<sup>4</sup> Merely depositing baggage on the carrier's platform or vehicle without calling any one's attention to it is not a sufficient delivery to the carrier to cause its liability to attach.<sup>5</sup> Delivery must, as a rule, in order to render the carrier liable, be made to some duly authorized agent of the company. It need not always be made to the person expressly authorized to care for baggage; it may sometimes be made to the ticket agent or other agent who is permitted to hold himself out as authorized to receive baggage and does actually receive baggage,<sup>6</sup> especially where such is the

<sup>1</sup> *Kerr v. Grand Trunk R. Co.*, 24 U. C. C. P. 209; *Wilson v. Grand Trunk R. Co.*, 57 Me. 138; *Ringwalt v. Wabash R. Co.*, 45 Neb. 760, s. c. 64 N. W. R. 219, 12 Lewis' Am. R. & Corp. R. 40.

<sup>2</sup> *Michigan, etc., R. Co. v. Meyers*, 21 Ill. 627; *Aikin v. Westcott*, 123 N. Y. 363, s. c. 25 N. E. R. 503.

<sup>3</sup> *Merriam v. Hartford, etc., R. Co.*, 20 Conn. 354, s. c. 52 Am. Dec. 344.

<sup>4</sup> *Rogers v. Long Island R. Co.*, 1 T. & C. (N. Y.) 396; *Merriam v. Hartford, etc., R. Co.*, 20 Conn. 354, s. c. 52 Am. Dec. 344. See, also, *Bankier v. Wilson*, 5 L. Can. R. 203.

<sup>5</sup> *Wright v. Caldwell*, 3 Mich. 51; *Rider v. Wabash, etc., R. Co.*, 14 Mo. App. 529; *Kerr v. Grand Trunk R. Co.*, 24 U. C. C. P. 209; *Ball v. New Jersey Steamboat Co.*, 1 Daly (N. Y.) 491.

<sup>6</sup> *Rogers v. Long Island R. Co.*, 38 How. Pr. (N. Y.) 289; *Camden, etc., R. Co. v. Belknap*, 21 Wend. (N. Y.) 354; *Witbeck v. Schuyler*, 31 How. Pr. (N. Y.) 97; *International, etc., R. Co. v. Folliard*, 66 Tex. 603, s. c. 1 S. W. R. 624; *Jordan v. Fall River R. Co.*, 5 Cush. (Mass.) 69. The baggage need not necessarily come into the possession of the company at the time

custom. Delivery, as we have just intimated, is often affected by custom. Thus, when it is customary to take baggage to a railway station and deposit it in the carrier's depot the carrier may become liable although no agent's attention was expressly called to the baggage.<sup>1</sup> But, as we have elsewhere shown, where the passenger retains exclusive custody and control of the baggage, there is no such constructive delivery or acceptance as will render the company liable for it as a common carrier.<sup>2</sup> The general subject of delivery and acceptance has been heretofore discussed at full length.<sup>3</sup>

**§ 1654. Rule where passenger retains custody of baggage.**

—The general rule in regard to the liability of common carriers of goods is, as we have elsewhere seen, that they are not liable as such unless they have the sole custody of the goods. This rule has also been applied to baggage in some cases, but it should not, perhaps, be applied with the same strictness, although the rule is essentially the same in both classes of cases. If the passenger retains the sole possession and custody of the baggage, so that there is no delivery to the company, the latter is not liable for its injury or loss, at least in the absence of negligence on its part, and even though negligent it may not always be liable.<sup>4</sup> Thus, where a passenger kept a hand-bag

the check is issued. *Chicago, etc., R. Co. v. Clayton*, 78 Ill. 616. In England it is customary for porters to receive baggage for the company, and it is held that the liability of the company attaches as soon as it is placed in their hands for the purpose of transit. *Lovell v. London, etc., R. Co.*, 45 L. J. Q. B. 476, 24 W. R. 394. But not where placed in their hands merely for custody and deposit. *Great Western R. Co. v. Bunch*, 13 App. Cas. 31, 57 L. J. Q. B. 361; *Welch v. London, etc., R. Co.*, 34 Weekly R. 166. See, also, *Leach v. South Eastern R. Co.*, 34 L. T. R. 134; *Bunch v. Great Western R. Co.*, L. R. 17 Q. B. Div. 215, s. c. 26 Am. & Eng. R. Cas. 137.

<sup>1</sup> *Green v. Milwaukee, etc., R. Co.*, 38 Iowa 100; *Freeman v. Newton*, 3 E. D. Smith (N. Y.), 246.

<sup>2</sup> *Post*, § 1654.

<sup>3</sup> *Ante*, §§ 1403, 1414.

<sup>4</sup> *Ante*, § 1623; *Beach on Contrib. Neg.*, § 173; *Kerr v. Grand Trunk R. Co.*, 24 U. C. C. P. 209; *Tower v. Utica R. Co.*, 7 Hill (N. Y.) 47, s. c. 42 Am. Dec. 36; *Bergheim v. Great Eastern R. Co.*, L. R. 3 C. P. Div. 221, s. c. 6 Cent. L. J. 222; *De Valle v. Steamboat Richmond*, 27 La. Ann. 90; *Cohen v. Frost*, 2 Duer (N. Y.) 335; *Kerr v. Grand Trunk R. Co.*, 24 U. C. C. P. 209. This is particularly true in regard to clothing and other articles carried on or about the person. The

in her possession and accidentally dropped it out of the car window, it was held that the company was not liable, although upon notice of the loss it refused to stop to enable her to recover it.<sup>1</sup> But it has been held that the mere fact that, by the mutual consent of the carrier and passenger, part of his baggage is placed in the same car in which he travels, and is to a certain extent under his immediate control, will not necessarily relieve the carrier from its liability as an insurer.<sup>2</sup> If, however, he assumes the control and custody of it, the carrier will be liable only for loss or injury caused by its failure to exercise reasonable and ordinary care.<sup>3</sup> So, in any event, "if the negligence of the passenger conduces to the loss," there can be no recovery.<sup>4</sup>

R. E. Lee, 2 Abb. (U. S.) 49; *Carpenter v. New York, etc., R. Co.*, 124 N. Y. 53, s. c. 26 N. E. R. 277; *Clark v. Burns*, 118 Mass. 275; *Steamboat Chrystal Palace v. Vanderpool*, 16 B. Mon. (Ky.) 302. See, also, *Weeks v. New York, etc., R. Co.*, 72 N. Y. 50; *First Nat. Bank v. Marietta, etc., R. Co.*, 20 Ohio St. 259, s. c. 5 Am. R. 655; *Hillis v. Chicago, etc., R. Co.*, 72 Iowa 228, s. c. 33 N. W. R. 643; *Abbott v. Bradstreet*, 55 Me. 530.

<sup>1</sup> *Henderson v. Louisville, etc., R. Co.*, 20 Fed. R. 430, s. c. on appeal, 123 U. S. 61, 3 Sup. Ct. R. 60.

<sup>2</sup> *Le Conteur v. London, etc., R. Co.*, L. R. 1 Q. B. 54; *Richards v. London, etc., R. Co.*, 7 Man., G. & S. 838, s. c. 62 Eng. Com. L. 838; *Butcher v. London, etc., R. Co.*, 16 Com. B. 13; *Great Western R. Co. v. Bunch*, L. R. 13 App. Cas. 31; *Great Northern R. Co. v. Shepherd*, 8 Exch. 30; *Gamble v. Great Western R. Co.*, 3 Up. Can. Error and App. 163; *Hannibal, etc., R. Co., v. Swift*, 12 Wall. (U. S.) 262; "Baggage in the Custody of the Passenger," 40 Cent. L. J. 444. But see *ante*, § 1623; *Berghem v. Great Eastern R. Co.*, L. R. 3 C. P. Div. 221, s. c. 6 Cent. L. J.

222; *Talley v. Great Western R. Co.*, L. R. 6 C. P. 44.

<sup>3</sup> *Ante*, § 1623; *Hutchinson on Carriers*, (2d ed.) § 700; *Bonner v. Grumbach*, 2 Tex. Civ. App. 482, 21 S. W. R. 1010; *Williams v. Keokuk, etc., Co.*, 3 Cent. L. J. 400; *Kinsley v. Lake Shore, etc., R. Co.*, 125 Mass. 54; *American Steamship Co. v. Bryan*, 83 Pa. St. 446; *Pullman's Pal. Car. Co. v. Pollock*, 69 Tex. 120, s. c. 5 S. W. R. 814, 816, 5 Am. St. R. 31. See, also, *Carpenter v. New York, etc., R. Co.*, 124 N. Y. 53, s. c. 26 N. E. R. 277; *McKee v. Owen*, 15 Mich. 115. But compare *Macklin v. New Jersey Steamboat Co.*, 7 Abb. Pr. N. S. (N. Y.) 229; *Mudgett v. Bay State Steamboat Co.*, 1 Daly (N. Y.) 151; *Gore v. Norwich, etc., Transp. Co.*, 2 Daly (N. Y.) 254.

<sup>4</sup> *Tower v. Utica, etc., R. Co.*, 7 Hill (N. Y.) 47, s. c. 42 Am. Dec. 36; *Wycokoff v. Queens County Ferry Co.*, 52 N. Y. 32, s. c. 11 Am. R. 650; *Talley v. Great Western R. Co.*, L. R. 6 C. P. 44; *Gleason v. Goodrich Trans. Co.*, 32 Wis. 85; *Wilson v. Baltimore, etc., R. Co.*, 32 Mo. App. 682; *Henderson v. Louisville, etc., R. Co.*, 20 Fed. R. 430, s. c. on appeal, 123 U. S. 61, 3 Sup.

§ 1655. **Baggage checks.**—Baggage checks are checks or tickets which railway companies issue to owners of baggage when the same is received for transportation. The custom of issuing baggage checks is in force on nearly, if not quite, all railroads in this country, and is so well known and established that the courts will take judicial knowledge of the general system.<sup>1</sup> The most important question that arises in regard to baggage checks is as to their effect. While there is some slight conflict in the authorities the strong current of opinion is to the effect that a baggage check does not embody the contract between the carrier and the person whose baggage is being carried but is merely a token or a receipt for the baggage given to the owner to enable the baggage to be identified at the end of the line.<sup>2</sup> There are some authorities, however, to the effect that a baggage check partakes of the nature of a bill of lading, and is evidence of the contract between the carrier and the owner of the baggage.<sup>3</sup> The possession of a baggage check

Ct. R. 60; *Bonner v. Grumbach*, 2 Tex. Civ. App. 482, 21 S. W. R. 1010; *Great Western R. Co. v. Bunch*, L. R. 13 App. Cas. 31, s. c. 57 L. J. Q. B. 361, s. c. 34 Am. & Eng. R. Cas. 224; *ante*, § 1624. But see *Bonner v. Mendoza*, 4 Tex. App. (Civ. Cas.) 392, s. c. 16 S. W. R. 976.

<sup>1</sup> *Abbott's Traveling Law School*, 58; *Isaacson v. New York, etc., R. Co.*, 94 N. Y. 278, s. c. 16 Am. & Eng. R. Cas. 188.

<sup>2</sup> *Hickox v. Naugatuck R. Co.*, 31 Conn. 281, s. c. 83 Am. Dec. 143; *Ahlbeck v. St. Paul, etc., R. Co.*, 39 Minn. 424, s. c. 12 Am. St. R. 661, 40 N. W. R. 364; *Chicago, etc., R. Co. v. Clayton*, 78 Ill. 616; *Smith v. Boston, etc., R. Co.*, 44 N. H. 325; *Mississippi, etc., R. Co. v. Kennedy*, 41 Miss. 671; *Isaacson v. New York, etc., Railroad Co.*, 94 N. Y. 278; *Hyman v. Central Vt. R. Co.*, 21 N. Y. Supp. 119; *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 212; *Cleveland, etc., R. Co. v. Tyler*,

9 Ind. App. 689, s. c. 35 N. E. R. 523. But failure to read a check has been held to be contributory negligence. *Gonthier v. New Orleans, etc., R. Co.*, 28 La. Ann. 67.

<sup>3</sup> "The check is in legal effect a bill of lading." *Louisville, etc., R. Co. v. Weaver*, 9 Lea 38, s. c. 16 Am. & Eng. R. Cas. 218. "A check for baggage answers the purpose of a bill of lading. It is evidence of the contract between the carrier and the traveler for the transportation of his baggage, and this suit was brought on that contract." *Anderson v. Wabash, etc., R. Co.*, 65 Iowa 131, s. c. 18 Am. & Eng. R. Cas. 377. So, it has been held that where a check is given for baggage to be carried only a part of the distance called for by the ticket, the check is regarded as standing in the place of a bill of lading for the distance called for, and the carriage and delivery must be made accordingly. *Louisville, etc., R. Co. v. Weaver*, 9 Lea (Tenn.) 38,

is *prima facie* evidence of the receipt of the baggage by the carrier.<sup>1</sup> Such evidence is not conclusive, however, but may be explained by other evidence.<sup>2</sup> It has also been held that proof of the presentation of the check with a demand for the baggage at a proper time at the place of destination, and an unconditional refusal on the part of the carrier to deliver it, raises a presumption of negligence on its part and makes a *prima facie* case against it.<sup>3</sup> Where baggage is checked by an owner who intends making a journey over lines of different railroads and at the end of one line he surrenders the baggage check first received and receives the baggage check of the second line the latter check is evidence that the line issuing it had received the baggage represented by such check.<sup>4</sup> But a through check over several different lines will not of itself, without a contract for through transportation, make the carrier responsible for loss of the baggage by one of the other connect-

s. c. 16 Am. & Eng. R. Cas. 218; Dill v. South Carolina, etc., R. Co., 7 Rich. L. (So. Car.) 158; Wilson v. Chesapeake, etc., R. Co., 21 Gratt. (Va.) 654.

<sup>1</sup> Davis v. Michigan, etc., R. Co., 22 Ill. 278, s. c. 74 Am. Dec. 151; Dill v. South Carolina R. Co., 7 Rich. L. (So. Car.) 158, s. c. 62 Am. Dec. 407; Denver, etc., R. Co. v. Roberts, 6 Colo. 333, s. c. 18 Am. & Eng. Cas. 627; Atchison, etc., R. Co. v. Brewer, 20 Kan. 669; Louisville, etc., R. Co. v. Weaver, 9 Lea (Tenn.) 38.

<sup>2</sup> Chicago, etc., R. Co. v. Clayton, 78 Ill. 616; Davis v. Michigan, etc., R. Co., 22 Ill. 278. Baggage checks have also been held admissible in evidence to show the nature of the carrier's contract. Wilson v. Chesapeake, etc., R. Co., 21 Gratt. (Va.) 654.

<sup>3</sup> Atchison, etc., R. Co. v. Brewer, 20 Kan. 669; Schouler on Bailm. & Car., § 694; Cleveland, etc., R. Co. v. Tyler, 9 Ind. App. 689, s. c. 35 N. E. R. 523. Indeed, it was held in the last case that such a demand and refusal made

a *prima facie* case although the check was not presented. But this last case seems to unjustly put the burden upon the company of determining at its peril who is the true owner, and require it to deliver the baggage to him without any proof of identity. The carrier has been held liable for delivering baggage to one upon his statement that he was the owner, without presentation of the check, and if this is the law, and if the check is *prima facie* evidence of identity against the carrier, it is difficult to see why it is not *prima facie* evidence in its favor, and why it should be held liable to one who demands the baggage without presentation of the check or proof of identity or right to it. See Abbott's Traveling Law School, 58; Laffrey v. Grummond, 74 Mich. 186, s. c. 41 N. W. R. 894, 895.

<sup>4</sup> Ahlbeck v. St. Paul, etc., R. Co., 39 Minn. 424, 40 N. W. Rep. 364; St. Louis, etc., R. Co. v. Hawkins, 39 Ill. App. 406; Kansas Pacific R. Co. v. Montelle, 10 Kan. 119.

ing carriers.<sup>1</sup> In some states statutes are in force which impose upon railway companies a penalty for failure to check baggage.<sup>2</sup>

§ 1656. **Baggage on one train and owner on another.**—In the absence of anything to the contrary, the rule is that the implied contract to carry a passenger's baggage which arises from the purchase of a ticket is that the passenger and his baggage shall be transported by the same train.<sup>3</sup> The purchase of a ticket, usually entitles a passenger only to transportation for himself and his baggage on the same train and nothing more.<sup>4</sup> Where baggage is received after the passenger has gone, the baggage, if carried at all, is carried as freight, and the carrier is entitled to compensation for such carriage.<sup>5</sup> While, as we have seen, the company is ordinarily under the duty to carry baggage on the same train on which the owner is carried, there are cases in which the carrier must carry the baggage as such although the owner does not accompany it on the same train. Thus, where the carrier receives the baggage in ample time to send it by the same train on which the owner takes passage, but fails to do so, it is still under an obligation to transport it on subsequent trains as baggage.<sup>6</sup> And where the company makes such a contract on the purchase of a ticket that it is bound to transport the baggage at all events, it is bound to

<sup>1</sup> *Green v. New York, etc., R. Co.*, 4 Daly (N. Y.) 553; *Stimson v. Connecticut, etc., R. Co.*, 98 Mass. 83; *Talcott v. Wabash R. Co.*, 89 Hun 492, 35 N. Y. Supp. 574. See *Louisville, etc., R. Co. v. Weaver*, 9 Lea (Tenn.) 38, s. c. 16 Am. & Eng. R. Cas. 218, and compare *Fox v. Wabash etc., R. Co.*, 38 N. Y. Supp. 88.

<sup>2</sup> *Norfolk, etc., R. Co. v. Irvine*, 84 Va. 553, 5 S. E. Rep. 532, 1 L. R. A. 110; *Commonwealth v. Connecticut River R. Co.*, 15 Gray (Mass.) 447.

<sup>3</sup> *Toledo, etc., R. Co. v. Tapp*, 6 Ind. App. 304; *Wilson v. Grand Trunk, etc., R. Co.*, 56 Me. 60, s. c. 8 Am. Law Reg. (N. S.) 398; *Glasco v. New*

*York, etc., R. Co.*, 36 Barb. (N. Y.) 557.

<sup>4</sup> *Blumenthal v. Maine, etc., R. Co.*, 79 Me. 550, s. c. 34 Am. & Eng. R. Cas. 247, 11 Atl. R. 605; *Becher v. Great Eastern R. Co.*, L. R. 5 Q. B. 241, 18 W. R. 627.

<sup>5</sup> *Wilson v. Grand Trunk Railway Co.*, 56 Me. 60, s. c. 8 Am. Law Reg. (N. S.) 398; *Collins v. Boston, etc., R. Co.*, 10 Cush. (Mass.) 506; *Graffam v. Boston, etc., R. Co.*, 67 Me. 234.

<sup>6</sup> *Wilson v. Grand Trunk Railway Co.*, 56 Me. 60, s. c. 8 Am. Law Reg. (N. S.) 398; *Warner v. Burlington, etc., R. Co.*, 22 Iowa 166.

exercise the same degree of care in the transportation of such baggage whether the same goes on a preceding or on a subsequent train to that on which the owner goes.<sup>1</sup> In order that there may be a recovery for lost or injured baggage, or that it should be carried as such, it is not always necessary that the owner himself should accompany the baggage. Some person who is a member of the owner's family and interested in the baggage may accompany it, and if the baggage is lost or injured the holder of the title to the baggage may recover.<sup>2</sup> But it has been held that where a servant, who pays his own fare, carries with him a parcel of baggage belonging to his master, who travels on a later train, and the baggage is lost, the master can not recover.<sup>3</sup>

**§ 1657. Rule where baggage is received by mistake.**—As a general rule, at least, “no man can have the care of another's property thrust upon him, without his invitation or consent, in such a way as to raise a duty calling for the performance of positive acts of protection.” It is therefore held that where baggage is delivered to a carrier by the owner, who erroneously supposes that his ticket entitles him to have it transported by such carrier, and the latter receives it under the mistaken belief that the owner had bought a ticket over its own road entitling him to have it so transported, when, in fact, he had purchased his ticket over another road, such carrier is not liable even for negligence in transporting the baggage, and the only duty it owes the owner with reference thereto is to abstain from willful or wanton injury to it.<sup>4</sup> If, however, the mistake occurs solely on account of the fault of the railroad company, as, for instance, where it takes baggage checked over another route, or not delivered to it, such company is doubtless liable at least for loss or injury caused by its failure to exercise ordinary care.<sup>5</sup>

<sup>1</sup> Warner v. Burlington, etc., R. Co., 22 Iowa 166; Wilson v. Chesapeake, etc., R. Co., 21 Gratt. (Va.) 654.

<sup>2</sup> Curtis v. Delaware, etc., R. Co., 74 N. Y. 116.

<sup>3</sup> Becher v. Great Eastern R. Co., L. R. 5 Q. B. 241, 39 L. J. Q. B. 122.

<sup>4</sup> Beers v. Boston, etc., R. Co., (Conn.) 34 Atl. R. 541.

<sup>5</sup> See Fairfax v. New York, etc., R.

§ 1658. **Baggage shipped over connecting roads.**—The subject of connecting carriers of freight has been fully treated elsewhere,<sup>1</sup> and, as the rules in regard to baggage are, in most respects, substantially the same, it will be unnecessary here to treat the subject at length. A railroad company is not bound to transport passengers and their baggage beyond its own terminus,<sup>2</sup> and may, as we shall hereafter see, limit its liability for baggage by contract to its own line, as in the case of freight. But, as the carriage of baggage is considered as an incident to the contract for the carriage of its owner, a through contract for the transportation of a passenger over several connecting lines is a through contract for the carriage of his baggage, and the initial company, in the absence of any valid limitation, may be held liable for the loss or destruction of the baggage on any of the lines.<sup>3</sup> The passenger may, however, if he elects to do so, proceed directly against the company on whose line the baggage was lost.<sup>4</sup> And, as we have

Co., 73 N. Y. 167, 170. See, also, *Isaacson v. New York, etc., R. Co.*, 94 N. Y. 278; *Estes v. St. Paul, etc., R. Co.*, 7 N. Y. Supp. 863.

<sup>1</sup> *Ante*, chapters LVIII, LIX.

<sup>2</sup> *Mauritz v. New York, etc., R. Co.*, 23 Fed. R. 765, s. c. 21 Am. & Eng. R. 286; *Central Trust Co. v. Wabash, etc., R. Co.*, 31 Fed. R. 247; *Harris v. Howe*, 74 Tex. 534, s. c. 39 Am. & Eng. R. Cas. 498; *Pennsylvania R. Co. v. Schwarzenberger*, 45 Pa. St. 208.

<sup>3</sup> *Talcott v. Wabash R. Co.*, 66 Hun 456, s. c. 21 N. Y. Supp. 318; *Hart v. Rensselaer R. Co.*, 8 N. Y. 37; *Burnell v. New York, etc., R. Co.*, 45 N. Y. 184; *Wilson v. Chesapeake, etc., R. Co.*, 21 Gratt. (Va.) 654; *Najac v. Boston, etc., R. Co.*, 7 Allen (Mass.) 329; *Smith v. Grand Trunk R. Co.*, 35 U. C. Q. B. 547; *Louisville, etc., R. Co. v. Weaver*, 9 Lea (Tenn.) 38, s. c. 16 Am. & Eng. R. Cas. 218; *Illinois Cent. R. Co. v. Copeland*, 24 Ill. 332;

*Candee v. Pennsylvania R. Co.*, 21 Wis. 582; *Wolff v. Central, etc., R. Co.*, 68 Ga. 653, s. c. 45 Am. R. 501; *Mytton v. Midland R. Co.*, 4 H. & N. 615; *Baltimore, etc., R. Co. v. Campbell*, 36 Ohio St. 647, s. c. 3 Am. & Eng. R. Cas. 246; *Hawley v. Screven*, 62 Ga. 347, s. c. 35 Am. R. 126.

<sup>4</sup> *Atchison, etc., R. Co. v. Roach*, 35 Kan. 740, s. c. 12 Pac. R. 93, s. c. 27 Am. & Eng. R. Cas. 257; *Louisville, etc., R. Co. v. Weaver*, 9 Lea (Tenn.) 38, s. c. 16 Am. & Eng. R. Cas. 218, 225; *Baltimore, etc., Co. v. Smith*, 23 Md. 402; *Davis v. Michigan, etc., R. Co.*, 22 Ill. 278; *Savannah, etc., R. Co. v. McIntosh*, 73 Ga. 532, s. c. 27 Am. & Eng. R. Cas. 269; *McCormick v. Hudson River, etc., R. Co.*, 4 E. D. Smith (N. Y.) 181; *Chicago, etc., R. Co. v. Fahey*, 52 Ill. 81; *Root v. Great Western R. Co.*, 45 N. Y. 524; *Hooper v. London, etc., R. Co.*, 50 L. J. Q. B. Div. 103, s. c. 29 W. R. 241; *ante*, § 1448.



elsewhere shown, a railroad company, in selling a ticket over several different lines, may be acting simply as agent for the other lines, so that the contract will not be a contract for through transportation on its part either for the passenger or his baggage.<sup>1</sup> So, it has been held that the mere fact that the initial carrier issues a through check is not sufficient to make it liable beyond its own line if the passenger's ticket is not a through ticket, or the liability of the company is expressly limited to its own line.<sup>2</sup> But, in other cases, baggage checks have been held admissible to show the nature of the carrier's undertaking.<sup>3</sup> In a recent case, although the ticket was what is known as a coupon ticket, over three roads, it was held that evidence that each coupon contained the initials of all the roads, that when the plaintiff reached the end of the first carrier's line he received a check from the second company over both its line and that of the last company, and was charged for extra weight of the baggage, and that the baggage went through from that point with him on the same train to his destination was sufficient to authorize a finding that the undertaking was a joint one and that the last two companies were jointly liable for articles which had been taken out of the trunk at some unknown place after it had left the line of the first carrier, which was not liable because it had expressly contracted against liability beyond its own line.<sup>4</sup> Where there is

<sup>1</sup> *Ante*, § 1596. See, also, § 1433, *et seq.*; *Central Trust Co. v. Wabash*, etc., R. Co., 31 Fed. R. 247.

<sup>2</sup> *Green v. New York, etc., R. Co.*, 12 Abb. Pr. N. S. (N. Y.) 473; *Milnor v. New York, etc., R. Co.*, 53 N. Y. 363; *Mennonstein v. Pennsylvania R. Co.*, 34 N. Y. Supp. 97. One reason for this, as said in the last case just cited, is that a baggage-master as such has no authority to contract for carriage beyond the line of his own company. Where tickets over a certain route were presented to the baggage-master, who agreed to check over that route, and he checked the baggage over a different connecting road, it

was held that the undertaking of the company was to deliver to the connecting carrier over the route named in the tickets and that it remained liable as an insurer. *Isaacson v. New York Cent., etc., R. Co.*, 94 N. Y. 278, s. c. 16 Am. & Eng. R. Cas. 188. See, also, *Rome R. Co. v. Wimberly*, 75 Ga. 316, s. c. 58 Am. R. 468.

<sup>3</sup> *Wilson v. Chesapeake, etc., R. Co.*, 21 Gratt. (Va.) 654; *Anderson v. Wabash, etc., R. Co.*, 65 Iowa 131, s. c. 21 N. W. R. 485; *Louisville, etc., R. Co. v. Weaver*, 9 Lea (Tenn.) 38, s. c. 16 Am. & Eng. R. Cas. 218.

<sup>4</sup> *Peterson v. Chicago, etc., R. Co.*, 80 Iowa 92, s. c. 45 N. W. R. 573. But

a valid contract limiting the liability of the first carrier to its own line, or in any case in which the passenger sues one of the connecting carriers, it is frequently difficult to locate the place of the loss or injury to the baggage. In such a case the last carrier has sometimes been held liable where the baggage started in good condition and was delivered by it in bad condition, upon the ground that it might be presumed to have reached it in the condition in which it started;<sup>1</sup> but proof of the mere failure of the last carrier to deliver any of the baggage, without proof that it ever came into its hands, is insufficient to entitle the passenger to recover from it.<sup>2</sup>

§ 1659. **Delivery by company—Duty of owner.**—As already shown, it is the duty of a railroad company to have a passenger's baggage ready for delivery to him at a proper place as soon as it reasonably can after his arrival at his destination, and it is the duty of the passenger to call for it within a reasonable time.<sup>3</sup> As a general rule this reasonable time does not extend to "another day or another occasion."<sup>4</sup> A passenger

compare *Montgomery, etc., R. Co. v. Culver*, 75 Ala. 587, s. c. 22 Am. & Eng. R. Cas. 411. See, also, *Gulf, etc., R. Co. v. Ions*, 3 Tex. Civ. App. 619, s. c. 22 S. W. R. 1011; *Felder v. Columbia, etc., R. Co.*, 21 So. Car. 35, s. c. 53 Am. R. 656; *Texas, etc., R. Co. v. Ferguson*, 1 Tex. App. (Civ. Cas.) 724, s. c. 9 Am. & Eng. R. Cas. 724; *Wolff v. Central R. Co.*, 68 Ga. 653, s. c. 6 Am. & Eng. R. Cas. 441.

<sup>1</sup> *Montgomery, etc., R. Co. v. Culver*, 75 Ala. 587, s. c. 22 Am. & Eng. R. Cas. 411; *Lin v. Terre Haute, etc., R. Co.*, 10 Mo. App. 125; *Jacobs v. Tutt*, 33 Fed. R. 412; *McCormick v. Hudson River, etc., R. Co.*, 4 E. D. Smith (N. Y.) 181; *Myerson v. Woolverton*, 29 N. Y. Supp. 737; *Caldwell v. Erie Transfer Co.*, 33 N. Y. Supp. 993.

<sup>2</sup> *Kessler v. New York, etc., R. Co.*, 61 N. Y. 538; *Stimson v. Connecticut River R. Co.*, 98 Mass. 83; *Felder v. Columbia, etc., R. Co.*, 21 So. Car. 35,

s. c. 27 Am. & Eng. R. Cas. 264. But see *Savannah, etc., R. Co. v. McIntosh*, 73 Ga. 532, s. c. 27 Am. & Eng. R. Cas. 269, with which compare *East Tenn., etc., R. Co. v. Johnson*, 85 Ga. 497, s. c. 11 S. E. R. 809. See, also, *Ringwalt v. Wabash R. Co.*, 45 Neb. 760, s. c. 12 Lewis' Am. R. & Corp. R. 40, and note, where the general subject is fully discussed and many analogous authorities relating to the presumption in case of goods lost or injured by connecting carriers are cited. See, also, §§ 1448, 1450.

<sup>3</sup> *Ante*, § 1652; *Patscheider v. Great Western R. Co.*, L. R. 3 Exch. Div. 153, s. c. 26 W. R. 268; *Ouimit v. Henshaw*, 35 Vt. 605; *Hoeger v. Chicago, etc., R. Co.*, 63 Wis. 100, s. c. 23 N. W. R. 435; *Vineberg v. Grand Trunk R. Co.*, 13 Ont. App. 93, s. c. 27 Am. & Eng. R. Cas. 271.

<sup>4</sup> *Ouimit v. Henshaw*, 35 Vt. 605; *Roth v. Buffalo, etc., R. Co.* 34 N. Y.

has a right to have his baggage delivered, in a proper case, at any regular station at which the train stops, and a regulation that baggage will be delivered at only one of several regular stations at which the train stops in a large city is unreasonable.<sup>1</sup> A delivery to the wrong person upon a forged order, it has been held, will not discharge the company.<sup>2</sup> It has also been held that where it is the custom to deliver the baggage into a carriage, and the baggage is lost while a railway porter is so delivering it, the company is liable.<sup>3</sup> But the general rule is that where the passenger, after arriving at his destination, takes charge of the baggage himself, or, after it is there delivered to him, either actually or constructively re-delivers it to a third person, or even to one of the company's employes as his agent, the company will not be liable for its loss.<sup>4</sup> If a railroad company carries baggage beyond the proper station and puts it in its baggage room at another station, from which it is stolen, it is liable for the loss,<sup>5</sup> and, as elsewhere shown,

548; *Jacobs v. Tutt*, 33 Fed. R. 412; *Chicago, etc., R. Co. v. Addizoat*, 17 Bradw. (Ill. App.) 632; *Louisville, etc., R. Co. v. Mahan*, 8 Bush (Ky.) 184; *Jones v. Norwich, etc., Transp. Co.*, 50 Barb. (N. Y.) 193; *Vineberg v. Grand Trunk R. Co.*, 13 Ont. App. 93, s. c. 27 Am. & Eng. R. Cas. 271; *Penton v. Grand Trunk R. Co.*, 28 U. C. Q. B. 367; *Wiegand v. Central R. Co.*, 75 Fed. R. 370. But see *Burnell v. New York, etc., R. Co.*, 45 N. Y. 184; *Pricke v. New Orleans, etc., Line*, 13 Mo. App. 436; *Burgevin v. New York, etc., R. Co.*, 69 Hun 479, 23 N. Y. Supp. 415, s. c. 52 N. Y. St. R. 617; *Mote v. Chicago, etc., R. Co.*, 27 Iowa 22; *Cary v. Cleveland, etc., R. Co.*, 29 Barb. (N. Y.) 35.

<sup>1</sup> *Pittsburgh, etc., R. Co. v. Lyon*, 123 Pa. St. 140, s. c. 16 Atl. R. 607.

<sup>2</sup> *Powell v. Myers*, 26 Wend. (N. Y.) 591. See, also, *Brown v. Canadian Pac. R. Co.*, 3 Manitoba 496. But compare *Mattison v. New York, etc., R. Co.*, 57 N. Y. 552.

<sup>3</sup> *Butcher v. London, etc., R. Co.*, 16 C. B. 13, s. c. 3 W. R. 409. Explained in *Bergheim v. Great Eastern R. Co.*, L. R. 3 C. P. Div. 221, s. c. 26 W. R. 318. See, also, *Mobile, etc., R. Co. v. Hopkins*, 41 Ala. 486, s. c. 94 Am. Dec. 607; *Ouimit v. Henshaw*, 35 Vt. 605, s. c. 84 Am. Dec. 646.

<sup>4</sup> *Hodkinson v. London, etc., R. Co.*, L. R. 14 Q. B. Div. 228, 32 W. R. 662; *Midland, etc., R. Co. v. Bromley*, 17 C. B. 372; *Minor v. Chicago, etc., R. Co.*, 19 Wis. 40; *Mulligan v. Northern, etc., Co.*, 4 Dak. 315, s. c. 29 N. W. R. 659, 27 Am. & Eng. R. Cas. 33; *Texas, etc., R. Co. v. Capps*, 2 Tex. App. (Civ. Cases) 35, s. c. 16 Am. & Eng. R. Cas. 118. But see *Voss v. Cleveland, etc., R. Co.*, (Ind. App. Ct.) 43 N. E. R. 20; *Curtis v. Avon, etc., R. Co.*, 49 Barb. (N. Y.) 148.

<sup>5</sup> *Toledo, etc., R. Co. v. Hammond*, 33 Ind. 379.

it may be liable as a warehouseman for damages caused by its failure to exercise ordinary care after it had the baggage ready for delivery, although the passenger failed to call for it at that time.<sup>1</sup>

§ 1660. **Liability for loss, injury or delay.**—We have already considered the liability of a railroad company generally in regard to baggage, and have shown when it is responsible as a common carrier, when as a warehouseman, and when merely as a gratuitous bailee.<sup>2</sup> It may be liable in tort for the loss of a passenger's baggage although his fare was paid by another,<sup>3</sup> and it has been held that a married man may recover for the loss of baggage furnished by him for the use of his wife and children as well as that used by himself, although he goes on one train and the baggage goes with the family on another,<sup>4</sup> and that where merchandise or extra baggage is knowingly received by the company and paid for by the passenger as the property of another, for whom he is agent, the principal may recover for its loss.<sup>5</sup> But it has been rightly held, on the other hand, that a railroad company is not liable for the goods of one who is not a passenger which are carried in the trunk of a passenger without its knowledge.<sup>6</sup> In another case passengers who had bought a ticket jointly and received a joint check for their baggage, which consisted of a chest owned by them jointly and articles therein owned by them in severalty, were permitted

<sup>1</sup> *Ante*, § 1652.

<sup>2</sup> *Ante*, §§ 1651, 1652.

<sup>3</sup> *Nugent v. Boston, etc., R. Co.*, 80 Me. 62, s. c. 12 Atl. R. 797, 800, citing *Marshall v. York, etc., R. Co.*, 11 C. B. (73 E. C. L.) 655. See, also, *Catlin v. Adirondack Co.*, 20 Hun (N. Y.) 19; *Flint, etc., R. Co. v. Weir*, 37 Mich. 111; *Van Horn v. Kermit*, 4 E. D. Smith (N. Y.) 453; *Macklin v. New Jersey, etc., Co.*, 7 Abb. Pr. N. S. (N. Y.) 229.

<sup>4</sup> *Curtis v. Delaware, etc., R. Co.*, 74 N. Y. 116. See, also, *Richardson v. Louisville, etc., R. Co.*, 85 Ala. 559,

s. c. 5 So. R. 308; *Baltimore, etc., Co. v. Smith*, 23 Md. 402.

<sup>5</sup> *Sloman v. Great Western R. Co.*, 67 N. Y. 208; *Fort Worth, etc., R. Co. v. I. B. Rosenthal, etc., Co.*, (Tex. Civ. App.) 29 S. W. R. 196. But compare *Weed v. Saratoga, etc., R. Co.*, 19 Wend. (N. Y.) 534.

<sup>6</sup> *Gurney v. Grand Trunk R. Co.*, 59 Hun 625, s. c. 14 N. Y. Supp. 321; *Talcott v. Wabash R. Co.*, 66 Hun 456, s. c. 21 N. Y. Supp. 318; *Becher v. Great Eastern R. Co.*, L. R. 5 Q. B. 241, s. c. 18 W. R. 627; *Dunlap v. International, etc., Co.*, 98 Mass. 371.

to maintain a joint action.<sup>1</sup> Where baggage is lost or injured while in the custody of a railroad company as a common carrier, the presumption is generally against the company.<sup>2</sup> At common law, under the rule that parties in interest were incompetent, it was held in some jurisdictions that a passenger could not testify as to the contents and value of baggage in a trunk or the like,<sup>3</sup> but in others such evidence was admitted on the ground of necessity,<sup>4</sup> and it is certainly admissible now, in most jurisdictions at least, under the modern statutes and rules of evidence. Damages may be recovered, in a proper case, for delay as well as for loss or injury to baggage.<sup>5</sup> But it has been held that a carrier is not liable for the loss of baggage caused by an unforeseen and unprecedented flood, although the flood would not have been encountered but for the carrier's delay.<sup>6</sup>

<sup>1</sup> *Anderson v. Wabash, etc., R. Co.*, 65 Iowa 131, s. c. 21 N. W. R. 485.

<sup>2</sup> *Camden, etc., R. Co. v. Baldauf*, 16 Pa. St. 67; *Montgomery, etc., R. Co. v. Culver*, 75 Ala. 587, s. c. 22 Am. & Eng. R. Cas. 411; *Chicago, etc., R. Co. v. Conklin*, 32 Kan. 55, s. c. 3 Pac. R. 762; *Burnell v. New York, etc., R. Co.*, 45 N. Y. 184, s. c. 6 Am. R. 61; *Matteson v. New York, etc., R. Co.*, 76 N. Y. 381; *Brown v. Eastern R. Co.*, 11 Cush. (Mass.) 97; *Pelland v. Canadian Pac. R. Co.*, 7 Mont. L. R. (S. C.) 131. But compare *Wald v. Louisville, etc., R. Co.*, 92 Ky. 645; *McQuesten v. Sanford*, 40 Me. 117.

<sup>3</sup> *Snow v. Eastern R. Co.*, 12 Met. (Mass.) 44; *Wright v. Caldwell*, 3 Mich. 51; *Bingham v. Rogers*, 6 Watts & S. (Pa.) 495; *Dill v. South Carolina R. Co.*, 7 Rich. L. (So. Car.) 158.

<sup>4</sup> *Cadwallader v. Grand Trunk R. Co.*, 9 Low. Can. 169; *Dibble v. Brown*, 12 Ga. 217; *McGill v. Rowand*, 3 Pa. St. 451; *Mad River, etc., R. Co. v. Fulton*, 20 Ohio 318. See, also, *Illinois, etc., R. Co. v. Taylor*, 24 Ill. 323; *Davis v. Michigan, etc., R. Co.*, 22

Ill. 278; *Douglass v. Montgomery, etc., R. Co.*, 37 Ala. 638.

<sup>5</sup> *Gulf, etc., R. Co. v. Vancil*, 2 Tex. Civ. App. 427, s. c. 21 S. W. R. 303; *Gulf, etc., R. Co. v. Douglas*, (Tex. Civ. App.) 30 S. W. R. 487; *Texas, etc., R. Co. v. Taylor*, 3 Tex. App. (Civ. Cas.) 234. But the company will not always be liable for delay merely because it does not carry the baggage on the same train with the passenger. *St. Louis, etc., R. Co. v. Ray*, (Tex. Civ. App.) 35 S. W. R. 951. As to the measure of damages for loss or injury, see *Gulf, etc., R. Co. v. Jackson*, 4 Tex. App. (Civ. Cas.) 73, s. c. 15 S. W. R. 128; *Lake Shore, etc., R. Co. v. Warren*, 3 Wyo. 134, 6 Pac. R. 724; *Fairfax v. New York, etc., R. Co.*, 73 N. Y. 167; *New Orleans, etc., R. Co. v. Moore*, 40 Miss. 39; *Spooner v. Hannibal, etc., R. Co.*, 23 Mo. App. 403; *Texas, etc., R. Co. v. Ferguson*, 1 Tex. App. (Civ. Cas.) 724, s. c. 9 Am. & Eng. R. Cas. 395.

<sup>6</sup> *Wald v. Pittsburgh, etc., R. Co.*, 60 Ill. App. 460. See, also, *Cooley on Torts* 72, and authorities there cited.

§ 1661. **Limiting liability.**—A railroad company, although it sells a through ticket for a continuous passage over several different lines, may, by a stipulation in the contract of carriage, limit its liability for loss or injury to baggage to such as may occur on its own line.<sup>1</sup> So, it has been held that carriers of passengers may, by specific regulations brought to the knowledge of the passenger, “protect themselves against liability as insurers for baggage exceeding a fixed amount in value, except upon additional compensation proportioned to the risk, provided the regulations are reasonable, and not inconsistent with any statute or their duties to the public.”<sup>2</sup> It has been held by some courts, however, that the liability of the carrier can not be restricted by words on a ticket or check or by other notice, even if brought to the knowledge of the passenger, unless he agrees to it.<sup>3</sup> Other courts, also treating a ticket or a check as a mere token, voucher or receipt, and not as a contract, have taken the same view where it did not appear that the passenger accepted it with notice of the condition or limitation.<sup>4</sup> There is certainly good reason for

In another recent case it is also held that where the baggage is lost in such a flood there is no presumption of negligence against the carrier and the burden of proving negligence rests upon the plaintiff. *Long v. Pennsylvania R. Co.*, 147 Pa. St. 343, s. c. 23 Atl. R. 459.

<sup>1</sup> *Peterson v. Chicago, etc., R. Co.*, 80 Iowa 92, s. c. 45 N. W. R. 573; *Gulf, etc., R. Co. v. Ions*, 3 Tex. Civ. App. 619, s. c. 22 S. W. R. 1011; *Zunz v. Southeastern R. Co.*, L. R. 4 Q. B. 539; *Burke v. Southeastern R. Co.*, L. R. 5 C. P. Div. 1, s. c. 28 W. R. 306; *Nealon v. Grand Trunk R. Co.*, 42 Hun (N. Y.) 651; *Central Trust Co. v. Wabash, etc., R. Co.*, 31 Fed. R. 247, s. c. 31 Am. & Eng. R. Cas. 103.

<sup>2</sup> *Railroad Co. v. Fraloff*, 100 U. S. 24; *The Majestic*, 56 Fed. R. 244, s. c. 60 Fed. R. 624; *Smith v. North Carolina R. Co.*, 64 N. Car. 235; *Steers*

*v. Liverpool, etc., Co.*, 57 N. Y. 1; *Texas, etc., R. Co. v. Willis*, 3 Tex. App. (Civ. Cas.) 94; *Wilton v. Atlantic, etc., Co.*, 10 C. B. N. S. 453.

<sup>3</sup> *Baltimore, etc., R. Co. v. Campbell*, 36 Ohio St. 647, s. c. 3 Am. & Eng. R. Cas. 246; *General Liability of Carriers of Passengers for Baggage*, 2 Am. & Eng. R. Cas. (N. S.) i, and authorities cited; *Davis v. Chicago, etc., R. Co.*, 83 Iowa 744, s. c. 49 N. W. R. 77 (invalid under statute); *Indianapolis, etc., R. Co. v. Cox*, 29 Ind. 360, s. c. 95 Am. Dec. 640; *Camden, etc., R. Co. v. Burke*, 13 Wend. (N. Y.) 611.

<sup>4</sup> *Wilson v. Chesapeake, etc., R. Co.*, 21 Gratt. (Va.) 654; *Mauritz v. New York, etc., R. Co.*, 23 Fed. R. 765, s. c. 21 Am. & Eng. R. Cas. 286; *Brown v. Eastern R. Co.*, 11 Cush. (Mass.) 97; *Kent v. Midland R. Co.*, L. R. 10 Q. B. 1; *Madan v. Sherard*,

applying this rule where the notice or condition is printed in such a manner as to deceive or mislead the passenger, and without negligence on his part, he fails to discover it at all, or until after his journey has commenced,<sup>1</sup> and a carrier after unconditionally receiving a passenger's baggage can not limit its responsibility by such a notice printed on a ticket afterwards purchased.<sup>2</sup> But, in some jurisdictions, it has been held that notice printed on a ticket is sufficient to bind the passenger,<sup>3</sup> and we think that where it is in the form of a contract, as is frequently the case where commutation and limited tickets or the like are issued, and the passenger has an opportunity to read it, he will be bound thereby, if the limitation is valid, even if he does not read it, especially if he signs it.<sup>4</sup> We have elsewhere stated our views upon this subject,<sup>5</sup> and have fully treated the effect of an attempt on the part of a carrier to contract against liability for its own negligence.<sup>6</sup>

73 N.Y. 329; *Blossom v. Dodd*, 43 N.Y. 264; *Kansas City, etc., R. Co. v. Rudebaugh*, 38 Kan. 45, s. c. 34 Am. & Eng. R. Cas. 219; *Parker v. Southeastern R. Co.*, L. R. 2 C. P. Div. 416, s. c. 25 W. R. 564.

<sup>1</sup> *Malone v. Boston R. Co.*, 12 Gray (Mass.) 388; *Verner v. Sweitzer*, 32 Pa. St. 208; *Camden R. Co. v. Baldauf*, 16 Pa. St. 67; *Clayton v. Hunt*, 3 Camp. 27; *Butler v. Heane*, 2 Camp. 415; *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 212; *Anderson v. Canadian Pac. R. Co.*, 17 Ont. R. 747, s. c. 40 Am. & Eng. R. Cas. 624; *Blossom v. Dodd*, 43 N. Y. 264; *Isaacson v. New York, etc., R. Co.*, 94 N. Y. 278; *Henderson v. Stevenson*, L. R. 2 Sc. & Div. App. Cas. 470, s. c. 32 L. T. N. S. 709.

<sup>2</sup> *Nevins v. Bay State, etc., Co.*, 4 Bosw. (N. Y.) 225.

<sup>3</sup> *Laing v. Colder*, 8 Pa. St. 479; *Pennsylvania R. Co. v. Raiordon*, 119 Pa. St. 577; *Hopkins v. Westcott*, 6 Blatch. (U. S. C. C.) 64.

<sup>4</sup> *Louisville R. Co. v. Nicholai*, 4 Ind. App. 119, s. c. 30 N. E. R. 424; *Terre Haute, etc., R. Co. v. Fitzgerald*, 47 Ind. 79; *Louisville, etc., R. Co. v. Harris*, 9 Lea (Tenn.) 180, s. c. 42 Am. R. 668; *Cresson v. Philadelphia, etc., R. Co.*, 11 Phila. 597; *Bland v. Southern Pac. R. Co.*, 55 Cal. 570, s. c. 36 Am. R. 50; *Bate v. Canadian Pac. R. Co.*, 15 Ont. App. 338, s. c. 37 Am. & Eng. R. Cas. 208; *Steers v. Liverpool, etc., Co.*, 57 N. Y. 1; *The Majestic*, 60 Fed. R. 624; *Fonseca v. Cunard, etc., Co.*, 153 Mass. 553, s. c. 27 N. E. R. 665, 12 L. R. A. 340; *Harris v. Great Western R. Co.*, L. R. 1 Q. B. Div. 515.

<sup>5</sup> *Ante*, §§ 1501, 1502, 1593, *et seq.* and notes.

<sup>6</sup> *Ante*, §§ 1497, 1498, 1500, 1510. The entire subject is fully considered and numerous authorities are cited in an article entitled "General Liability of Carriers of Passengers for Baggage," 2 Am. & Eng. R. Cas. (N. S.) i."

§ 1662. **Carrier's lien on baggage.**—As the fare charged a passenger is for, or includes, the transportation of his baggage as well as himself, the carrier has a lien on the baggage, while in its possession, for the payment of such fare.<sup>1</sup> But it has no lien upon the clothing and other articles upon the person of the passenger or retained in his exclusive possession.<sup>2</sup> The right of a carrier to detain baggage, under its lien, for the payment of fare, must be properly exercised, and if it permits part of the baggage to be wrongfully taken away, or if it is lost or injured on account of the carrier's negligence while so detaining it, the carrier will be answerable therefor.<sup>3</sup>

<sup>1</sup> *Roberts v. Koehler*, 30 Fed. R. 94;      <sup>2</sup> See *Ramsden v. Boston, etc., R.Co.*,  
*Wolf v. Summers*, 2 Camp. 631; 104 Mass. 117; *Lynch v. Metropolitan*,  
*Hutchinson on Carriers*, (2d ed.) § 719.      etc., R. Co., 90 N. Y. 77.  
 See, also, *Rumsey v. Northeastern R.*      <sup>3</sup> *Southwestern R. Co. v. Bently*, 51  
*Co.*, 14 C. B. N. S. 641, s. c. 11 W. R.      Ga. 311. See, also, *Tanco v. Booth*, 89  
 911; *Nordemeyer v. Loescher*, 1 Hilt.      N. Y. St. R. 82.  
 (N. Y.) 499.



## CHAPTER LXXI.

### THE INTERSTATE COMMERCE ACT.

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| <p>§ 1663. The source, nature, and extent of the federal power over interstate railroads.</p> <p>1664. Commerce clause of the federal constitution—Generally.</p> <p>1665. State power as limited by the commerce clause of the federal constitution—Generally.</p> <p>1666. The interstate commerce act—Generally.</p> <p>1667. Construction of the interstate commerce act.</p> <p>1668. The police power as affected by the commerce clause.</p> <p>1669. State statutes held to be regulations of interstate commerce.</p> <p>1670. State statutes held not to be regulations of interstate commerce.</p> <p>1671. Interstate commerce.</p> <p>1672. The interstate commerce commission.</p> <p>1673. Railroads engaged in domestic commerce—When a railroad is interstate.</p> | <p>1674. Commerce and manufactures — Monopolies — Trusts — Conspiracies.</p> <p>1675. Combinations—Pooling.</p> <p>1676. Discrimination—Undue preference—What is under the interstate commerce act.</p> <p>1677. Preference — Discrimination —When not unjust—Differences in circumstances and conditions.</p> <p>1678. Undue preference—Discrimination — Illustrative instance.</p> <p>1679. Undue preference—Question one of mixed law and fact.</p> <p>1680. Rebates as affected by the interstate commerce act.</p> <p>1681. Formation of connecting lines — Preference—Terminal facilities.</p> <p>1682. Long and short haul.</p> <p>1683. Group rates.</p> <p>1684. Reasonable charges.</p> <p>1685. Interchange of business.</p> <p>1686. Joint tariffs—Through rates.</p> <p>1687. Party rates — Mileage and commutation tickets.</p> <p>1688. Violations of the interstate commerce act—Indictment.</p> |
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§ 1663. The source, nature and extent of the federal power over interstate railroads.—To ascertain and determine the nature and extent of the federal power over interstate railroads two provisions of the national constitution must be considered, namely, (1) that which declares that: "Congress shall have

power to regulate commerce with foreign nations and among the several states and with the Indian tribes," and (2) that which reads thus: "Congress shall have power to make all laws which shall be necessary and proper for the carrying into execution the foregoing powers and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."<sup>2</sup> The effect of these provisions is to vest in congress supreme power over all instrumentalities of interstate commerce and to confer upon it the authority to enact such laws as it may deem necessary to the proper and effective exercise of that power. The principal power being granted and authority conferred to adopt measures to carry that power into execution, congress has a plenary discretion as to the choice of means and methods. As said in an early case: "Congress must possess the choice of means and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution."<sup>3</sup> The grant of power is very broad and comprehensive and extends to all matters legitimately connected with "commerce among the several states."<sup>4</sup> It has, indeed, been said that: "The power of congress to regulate an instrumentality of commerce is practically unlimited because it may reach the commerce itself as well as its agencies."<sup>5</sup> The term "commerce" means "commercial intercourse between nations and parts of nations in all its branches."<sup>6</sup> This principle requires the conclusion that the constitution extends to and embraces all the branches of commerce "among the several states" and all the agencies and instrumentalities engaged or employed in that commerce.<sup>7</sup> "Wherever commerce among the states goes the

<sup>1</sup> Const., art. I, § VIII, subdivision 4.

<sup>2</sup> Const., art. I, § VIII, subdivision 19. The provisions of the federal constitution are potent enough to authorize congress to establish railroads. *California v. Central Pac. R. Co.*, 127 U. S. 1; *Cherokee Nation v. Southern, etc., R. Co.*, 135 U. S. 641. Having power to regulate commerce the United States "may select the appro-

priate means" of exercising the power. *McCulloch v. Maryland*, 4 Wheat. 316, 409.

<sup>3</sup> *United States v. Fisher*, 2 Cranch 358; *Legal Tender Cases*, 110 U. S. 421.

<sup>4</sup> *United States v. Coombs*, 12 Pet. 72.

<sup>5</sup> *Louisville, etc., R. Co. v. Railroad Commission*, 19 Fed. R. 678.

<sup>6</sup> *Gibbons v. Ogden*, 9 Wheat. 1.

<sup>7</sup> *Gibbons v. Ogden*, 9 Wheat. 1;

power of the nation goes with it.'"<sup>1</sup> It is a matter of history as well as of express adjudication that one of the principal objects of the authors of the constitution was to secure uniformity, avert the clashing of conflicting state interests and prevent sectional legislation dictated by state jealousy or local prejudice.<sup>2</sup> It is unquestionably true that the framers of the constitution desired to secure uniformity and prevent diversity, and that for the purpose of attaining that object they placed the commerce clause in the constitution. It seems to us, as elsewhere suggested, that the inaction of congress does not authorize action by the states, but it can not be safely affirmed that the authorities warrant the broad conclusion suggested, for the conflict is so great that as much as can be safely said is that, where the subject is one requiring uniformity of regulation, inaction on the part of congress does not authorize action by the states, and that there are cases where inaction on the part of congress justifies action by the states. It has been held that the United States has no common law, and that when the federal courts do enforce common law rules they do so only upon the theory that the common law is regarded as part of the local law of the state.<sup>3</sup> Accepting as good law the

- State Freight Tax Cases, 15 Wall. 232; 138 U. S. 78, s. c. 11 Sup. Ct. R. 213; *Smith v. Turner*, 7 How. 283; *White's Bank v. Smith*, 7 Wall. 646; *Corfield v. Coryell*, 4 Wash. C. C. 371; *Pensacola, etc., Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347; *McCall v. California*, 136 U. S. 104; *Brown v. Maryland*, 12 Wheat. 419; *Stockton v. Baltimore, etc., R. Co.*, 32 Fed. R. 9; *The Daniel Ball*, 10 Wall. 557; *The Montello*, 20 Wall. 430; *The City of Salem*, 2 Interst. Com. R. 418; *Stanley v. Wabash, etc., R. Co.*, 3 Interst. Com. R. 176. See, generally, *Preston v. Finley*, 72 Fed. R. 850; *Henson v. Lott*, 8 Wall. 148; *Woodruff v. Parham*, 8 Wall. 123; *Emert v. Missouri*, 156 U. S. 296, s. c. 15 Sup. Ct. R. 367; *Brimmer v. Rebman*, 138 U. S. 78, s. c. 11 Sup. Ct. R. 213; *Donald v. Scott*, 67 Fed. R. 854; *Cantini v. Tillman*, 54 Fed. R. 969; *Pierce v. New Hampshire*, 5 How. 554; *South Carolina v. Seymour*, 153 U. S. 353; *In re Minor*, 69 Fed. R. 233; *Ex parte Hough*, 69 Fed. R. 330.
- <sup>1</sup>*Gilman v. Philadelphia*, 3 Wall. 713.
- <sup>2</sup>*County of Mobile v. Kimball*, 102 U. S. 691; *Welton v. State*, 91 U. S. 275; *Leisy v. Hardin*, 135 U. S. 100; *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557.
- <sup>3</sup>*Wheaton v. Peters*, 8 Pet. 591; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Swift v. Philadelphia, etc., R. Co.*, 64 Fed. R. 59; *Phipps v. Harding*, 70 Fed. R. 468; *In re Barry*, 42 Fed. R. 113; *The Scotland*, 105 U. S.

rule that there is no such thing as federal common law the necessary conclusion is that the rights, duties and liabilities of interstate railroad companies must, so far as regards commerce among the several states, be regulated by federal legislation. It is difficult, however, to reconcile the doctrine of the cases which affirm that there is no federal common law with the doctrine of many other federal decisions.<sup>1</sup> It is not easy to perceive how the doctrine can be reconciled with that asserted in the great number of cases which affirm that the fed-

24, 32; *In re Burrus*, 136 U. S. 586, s. c. 10 Sup. Ct. R. 850; *Kendall v. United States*, 12 Pet. 524. But see *Murray v. Chicago, etc., R. Co.*, 62 Fed. R. 24; *Fenn v. Holme*, 21 How. 481, 484; *Kohl v. United States*, 91 U. S. 367, 374, 376; *Moore v. United States*, 91 U. S. 270; *Atchison, etc., Co. v. Denver, etc., Co.*, 110 U. S. 667, 4 Sup. Ct. R. 185. In *Coffin v. United States*, 156 U. S. 432, s. c. 15 Sup. Ct. R. 394, the court relied upon the rules of the common law and of the civil law, saying of one of the common law rules that: "It lies at the foundation of the administration of our criminal law." If this be true, as unquestionably it is, is there not a federal common law? We think the common law in a sense envelopes all American courts, except where there is a system of law excluding it, much as the atmosphere does the earth. Life and letters of Joseph Story, vol. 1, p. 299; 2 Elliott's Gen. Pr., § 297; *Duncan v. United States*, 7 Pet. 435; *Cox v. United States*, 6 Pet. 172, 173.

<sup>1</sup> *Baltimore R. Co. v. Baugh*, 149 U. S. 368, s. c. 13 Sup. Ct. R. 914, and cases following it. Many of the decisions of the Supreme Court of the United States do recognize the fact that there is such a thing "as a general common law." In scores of cases where the question was not local to the state in

any sense, as, for instance, such cases as *Munn v. Illinois*, 94 U. S. 113, the court invokes the common law. If there is a general rule of law not local to the state, as there is in very many of the interstate commerce cases, and that rule influences the decisions of the federal courts it must be a federal common law rule. In admiralty cases general common law rules bring about decisions and in admiralty cases local law is not an element. Constitutions are framed with reference to existing things and upon the theory that there is an organized society governed by laws, and when a subject is provided for in the constitution it is the subject as recognized by organized society and governed by law. All constitutions presume a reign of law, not a condition of anarchy. See, generally, *Murray v. Chicago, etc., R. Co.*, 62 Fed. R. 24; *Watson v. Tarpley*, 18 How. (U. S.) 517; *Van Ness v. Pacard*, 2 Pet. (U. S.) 137, 148; *United States v. Reid*, 12 How. U. S. 361; *American Ins. Co. v. Canter*, 1 Pet. 511, 546; *New Jersey, etc., Co. v. Merchants' Bank*, 6 How. 344, 390; *Cox v. United States*, 6 Pet. 172; *Duncan v. United States*, 7 Pet. 435; *Swift v. Tyson*, 16 Pet. 1, 18; *Oates v. National Bank*, 100 U. S. 239; *Railroad Co. v. National Bank*, 102 U. S. 14; *Cooley Const. Lim.*, 31.

eral courts will follow the decisions of the state tribunals upon local questions but not upon questions of general law. Were it not for the decisions of eminent judges affirming that there is no federal common law we should be firmly of the opinion that when the constitution conferred upon the general government supreme power over a subject long known to the law and often passed upon by the courts it carried with the subject the common law. Even as against these decisions we venture the opinion that there is such a thing as unwritten law which forms part of our whole system of jurisprudence, national and state. It is quite difficult for us to conceive how a subject can be expressly and entirely placed under the dominion of the federal government and yet the common law of the subject not go with it. We do not believe that any written statutes can contain all the law there is upon a subject and do believe that recourse must be had to living principles. In American and English jurisprudence those principles are chiefly found in the common law. We can not believe that legislation does or can compass all the principles of right and justice, nor all the principles which govern the conduct and business of men or control the administration of justice.<sup>1</sup> It seems to us that the general principles of the common law (that is, such principles as are not peculiar to the governmental or social system of England, but such general principles as affect primary rights of persons or property) are part of the law of this nation. In cases far too numerous for citation reference is made to the principles contained in the Magna Charta, the Petition of Right and to the rules laid down by the courts of England, and these references indicate that notwithstanding some declar-

<sup>1</sup>In *Town of Pawlet v. Clark*, 9 Cranch 292, it was said: "We take it to be a clear principle that the common law in force at the emigration of our ancestors is deemed the birthright of the colonies unless it is inapplicable to their situation or repugnant to their other rights and privileges." See, also, *Norris v. Harris*, 15 Cal. 226, 232; *Fisk's Critical Period of Am. History*, 97; 1 Kent. Com. 471; 1 Story Const., § 157; *Cooley's Const. Lim.*, 37; *Robinson v. Cambell*, 3 Wheat. 212. But see *Bucher v. Cheshire Railroad*, 125 U. S. 555; *United States v. Railroad, etc., Co.*, 6 McLean 517; *Lorman v. Clarke*, 2 McLean 568.

ations to the contrary, the federal courts do, consciously or unconsciously, recognize the fact that there is a federal common law. It is, indeed, almost impossible to exclude it from the mind in considering any case involving great general principles.<sup>1</sup>

**§ 1664. Commerce clause of the federal constitution—Generally.**—In other places we have considered the commerce clause of the federal constitution and have spoken of the limitations it imposes upon the power of the states.<sup>2</sup> As we have shown, the effect of the commerce clause of the federal constitution is to deprive the states of the power to enact statutes, which, no matter what form they may assume, are strictly and in a clear legal effect regulations of interstate commerce.<sup>3</sup> It

<sup>1</sup> As illustrating the doctrine of the text, see *Moore v. United States*, 91 U. S. 270; *United States v. Clark*, 96 U. S. 37; *Oscanyan v. Arms Co.*, 103 U. S. 261; *Marshall v. Baltimore, etc., R. Co.*, 16 How. 314; *Tool Co. v. Norris*, 2 Wall. 45; *Trist v. Child*, 21 Wall. 441; *Hannauer v. Doane*, 12 Wall. 342; *Thomas v. City of Richmond*, 12 Wall. 349; *Woodstock, etc., Co. v. Richmond, etc., Co.*, 129 U. S. 643, s. c. 4 Sup. Ct. R. 402; *Kohl v. United States*, 91 U. S. 367; *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 667, s. c. 4 Sup. Ct. R. 485; *Fenn v. Holme*, 21 How. 481; *Oates v. National Bank*, 100 U. S. 239; *Railroad Co. v. National Bank*, 102 U. S. 14; *Moore v. United States*, 91 U. S. 270. In *Smith v. Alabama*, 124 U. S. 465, s. c. 8 Sup. Ct. R. 564, it is said that: "There is, however, one clear exception to the statement that there is no national common law." But courts can not make law, so that if there be law not contained in statutes upon which courts can give judgment it must be the law our ancestors brought from the mother country.

<sup>2</sup> *Ante*, §§ 658, 667, 668, 670, 671, 690,

708. As to taxation of interstate railroads, see *ante*, §§ 753-784. See, as to the general power of the federal government, *In re Debs*, 158 U. S. 564, s. c. 15 Sup. Ct. R. 900; *United States v. Cassidy*, 67 Fed. R. 698; *Gulf, etc., R. Co. v. Hefley*, 158 U. S. 98, s. c. 15 Sup. Ct. R. 802; *Solan v. Chicago, etc., R. Co.*, (Iowa) 63 N. W. R. 692; *Houston, etc., R. Co. v. Williams*, (Texas Civ. App.) 31 S. W. R. 556; *Cuban, etc., Co. v. Fitzpatrick*, 66 Fed. R. 63; *Ex parte Jervey*, 66 Fed. R. 957; *Jervey v. The Carolina*, 66 Fed. R. 1013; *Ames v. Union, etc., R. Co.*, 64 Fed. R. 165; *Frere v. Von Schoeler*, 47 La. Ann. 324, s. c. 16 So. R. 808, 27 L. R. A. 414; *City of San Bernardino Southern, etc., R. Co.* 107 Cal. 524, s. c. 40 Pac. R. 796.

<sup>3</sup> *Ante*, §§ 658, 667. We do not think that the decision in *Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. R. 1086, can be regarded as denying the doctrine of the cases which adjudge that a state can not enact a statute regulating interstate commerce but it must be confessed that it is difficult to reconcile some of the statements of the opinion with the rulings

is safe to say that the power to regulate interstate or foreign commerce resides in the federal congress, and that if congress elects to exercise the power the states can not effectively legislate upon the subject. As elsewhere indicated, the questions of doubt and difficulty are those which arise in cases where there is inaction by congress and in cases where the controlling inquiry is whether the state statute is such "a regulation of commerce among the several states" as brings it into conflict with the federal constitution or laws.<sup>1</sup> We think it clear that where there is such conflict, that is, where the statute impedes or obstructs commerce between the states, the statute must yield and the commerce clause of the federal constitution prevail.

§ 1665. State power as limited by the commerce clause of the federal constitution—Generally.—It was said several years ago by one of the justices of the supreme court of the United States that all the decisions upon the power of the states under the commerce clause of the federal constitution were given by a divided court, and it is still true that in the majority of cases the court is divided in opinion. Individual notions creep into opinions, for the judge to whom the duty of writing the opinion for the court is delegated very often incorporates in the

in other cases. The statement of the text is supported by the cases collected in the notes to the sections above referred to. See *Pembina, etc., Co. v. Pennsylvania*, 125 U. S. 181; *Henderson v. Mayor of N. Y.*, 92 U. S. 259; *Chy Lung v. Freeman*, 92 U. S. 275; *People v. Compagnie, etc.*, 107 U. S. 59; *Railroad Co. v. Husen*, 95 U. S. 465; *Hall v. DeCuir*, 95 U. S. 485; *Wabash, etc., Co. v. Illinois*, 118 U. S. 557; *Leisy v. Hardin*, 135 U. S. 100; *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 465; *McCall v. California*, 136 U. S. 104.

<sup>1</sup> We venture to say, but not without hesitation and diffidence, that it is difficult for us to accept the doctrine of concurrent power. As power over

the subject is, by the paramount law, lodged in the general government, inaction by congress can not transfer the power nor authorize its exercise by state legislatures. Whether congress acts or does not act can not, as we believe, vest a right in the states which, by the constitution is vested in the United States. Where the supreme law places the power there it resides even though it may not be exercised. The failure to exercise the power by the government to which it belongs can not, as we believe, justify its exercise by a government to which the power does not belong. *Stoutenburgh v. Hennick*, 129 U. S. 141, 148; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 498.

opinion his individual views or, at least, gives tone and color to the conclusions of the court from his individual conceptions, and this has deepened the confusion. Very able opinions have been written, strong in argument and rich in authority, but the truth remains that there is yet confusion and obscurity. The opinions of the great chief justice, John Marshall, laid with a master's power the foundations of the doctrines of our day, but the expansion of commerce and the changes that time has wrought, have brought into existence new conditions, new agencies, and new situations, so that there are many questions which the earlier cases did not meet or decide. The meaning of the term "regulation of interstate commerce" has not been defined with clearness and distinctness, and it is very difficult to say with precision what meaning should be assigned to the term. The courts, it is true, have adjudged many statutes to be void because they assumed to regulate commerce among the states and have upheld others for the reason that, although they affect interstate commerce, they are not to be regarded as regulations of that commerce within the meaning of the organic law, but yet it is true that there is no authoritative adjudication that will warrant the statement of a definition or rule of general application. In saying, as we have often done, that a state has no power to enact a statute that assumes to establish a regulation of interstate commerce, or a statute that in its effect and operation does make such a regulation, we are not to be understood as affirming that a state may not, in the absence of legislation by congress, legislate upon subjects connected with interstate commerce, but on the contrary, we affirm that the weight of authority is, although there is conflict, that in the absence of legislation by congress a state may legislate upon the subject although it can not establish a regulation that is in effect and operation "clearly a regulation of interstate commerce." It is, indeed, safe to say that no state has power to establish regulations that so operate as to burden, impede or obstruct<sup>1</sup> com-

<sup>1</sup> *Leisy v. Hardin*, 135 U. S. 100; *S. 622*; *In re Rahrer*, 140 U. S. 545; *Bowman v. Chicago, etc., R. Co.*, 125 Illinois, etc., *R. Co. v. People*, 163 U. S. 465; *Brown v. Houston*, 114 U. S. 142, 16 Sup. Ct. R. 1096; *Rail-*



merce between the several states,<sup>1</sup> but as is evident from what we have said, what is a regulation of interstate commerce within the meaning of the law is not easily determined. The question as to the power of the states to legislate upon subjects connected with interstate commerce has, as we have seen,<sup>2</sup> often been before the courts, but, notwithstanding this fact, the limitations upon the power of the states have not been precisely marked out, and although it is well settled that there are strong and unbending limitations upon the power of the states it can not be affirmed that the lines which bound the respective spheres of the state and national governments are distinctly known, and hence it can not be known just what state legislation is such a regulation of commerce as cuts into the sphere of the national government, and is, for that reason, to be condemned. It has been held that a state statute requiring a domestic railroad company to provide separate accommodations for white and colored persons is valid,<sup>3</sup> but the clear implication

road Co. *v.* Richmond, 19 Wall. 584; Stone *v.* Farmers', etc., Trust Co., 116 U. S. 307, 334. *Ante*, §§ 662, 668, 669, 672, 679, 689-692.

<sup>1</sup>The principle stated in the text has often been asserted in tax cases. *Ante*, §§ 753, 754, 755, 760, 761. See, also, Bank Tax Cases, 2 Wall. 200; Society, etc., *v.* Coite, 6 Wall. 594; Provident, etc., *v.* Massachusetts, 6 Wall. 611; McCulloch *v.* Maryland, 4 Wheat. 316; Weston *v.* City of Charleston, 2 Pet. 449; People *v.* Commissioners, 2 Black 620; Railroad Co. *v.* Peniston, 18 Wall. 5; Achison *v.* Huddleson, 12 How. 293; California *v.* Central Pac. R. Co., 127 U. S. 1; Thompson *v.* Pac. R. Co., 9 Wall. 579; Passenger Cas., 7 How. 469-482; Brown *v.* Maryland, 12 Wheat. 419; Crandall *v.* State, 6 Wall. 35; Woodruff *v.* Parham, 8 Wall. 123; Waring *v.* Mayor, 8 Wall. 110; Cook *v.* Pennsylvania, 97 U. S. 566; Hinson *v.* Lott, 8 Wall. 148; Osborne *v.* Mobile, 16 Wall. 479; Tiernan *v.* Rinker, 102 U. S.

123; Webber *v.* Virginia, 103 U. S. 344, and cases cited; Ward *v.* Maryland, 12 Wall. 418; Ratterman *v.* Western Union Tel. Co., 127 U. S. 411, and cases cited; Hays *v.* Pacific, etc., Steamship Co., 17 How. 596. See Western Union, etc., Co. *v.* Taggart, 163 U. S. 1, 16 Sup. Ct. R. 1054; Columbus Railway Co. *v.* Wright, 151 U. S. 470, s. c. 14 Sup. Ct. R. 396; Western Union, etc., Co. *v.* Taggart, 141 Ind. 281, s. c. 40 N. E. R. 1051.

<sup>2</sup>*Ante*, §§ 662, 668-672, 679, 689-692.

<sup>3</sup>Plessy *v.* Ferguson, 163 U. S. 537, 16 Sup. Ct. R. 1138, affirming *Ex parte* Plessy, 45 La. Ann. 80 s. c. 11 So. R. 948, and citing State *v.* McCann, 21 Ohio St. 198; Lehigh *v.* Brummell, 103 Mo. 546, 15 S. W. R. 765; Ward *v.* Flood, 48 Cal. 36; Bertonneau *v.* Board of Directors, 3 Woods 177, s. c. 3 Fed. Cas. 1361; People *v.* Gallagher, 93 N. Y. 438; Cory *v.* Carter, 48 Ind. 327; Dawson *v.* Lee, 83 Ky. 49; State *v.* Gibson, 36 Ind. 389.

from the case referred to, and the express statements in other cases, require the conclusion that a statute of that character would be regarded as void if it assumed to regulate commerce between the states. But it has been held that, where the charter or local law prohibited the exclusion of persons on account of their color the company could not rightfully require colored persons to travel in cars exclusively assigned to such persons although the cars were as good as those provided for white persons.<sup>1</sup> It has also been held that a statute of a state providing that interstate carriers shall give to all persons, without distinction of race or color, equal accommodations, is void because it is a regulation of interstate commerce.<sup>2</sup>

§ 1666. **The interstate commerce act—Generally.**—As the power of the federal government over commerce among the several states is supreme, and as the general government has a free choice of means and methods there can be no doubt as to the validity of the interstate commerce act. That act rests upon solid foundations so far as the legal aspects of the question are concerned, no matter what may be thought of the policy or expediency of such a law. But there is no necessity nor, indeed, any excuse for discussing the question of the validity of the law since that question is at rest,<sup>3</sup> and with

<sup>1</sup> *Railroad Co. v. Brown*, 17 Wall. 445; *Carrey v. Spencer*, 36 N. Y. S. 886.

<sup>2</sup> *Hall v. De Cuir*, 95 U. S. 485. In *Plessy v. Ferguson*, 163 U. S. 537, the court said of the case cited, that, "The court in that case, however, disclaimed that it had anything whatever to do with the statute as a regulation of interstate commerce, or affecting anything else than commerce among the states." See, also, *Louisville, etc., R. Co. v. Mississippi*, 133 U. S. 587, 591, s. c. 10 Sup. Ct. R. 348; *Louisville, etc., R. Co. v. State*, 66 Miss. 662, s. c. 6 So. R. 203; *State v. Hicks*, 44 La. Ann. 770, 11 So. R. 74; *West Chester, etc., Co. v. Miles*, 55 Pa. St. 209; *Day v.*

*Owen*, 5 Mich. 520; *Chesapeake, etc., R. Co. v. Wells*, 85 Tenn. 613, s. c. 4 S. W. R. 5; *The Sue*, 22 Fed. R. 843; *Logwood v. Memphis, etc., R. Co.*, 23 Fed. R. 318; *McGuinn v. Forbes*, 37 Fed. R. 639; *People v. King*, 110 N. Y. 418, 18 N. E. R. 245; *Houck v. Southern, etc., R. Co.*, 38 Fed. R. 226; *Heard v. Georgia R. Co.*, 3 Interst. Com. R. 111, s. c. 1 Interst. Com. R. 428.

<sup>3</sup> *Ante*, §§ 675, 676; *Kentucky, etc., Co. v. Louisville, etc., Co.*, 37 Fed. R. 567, s. c. 2 L. R. A. 289, 2 Interst. Com. R. 351; *United States v. Boston, etc., R. Co.*, 15 Fed. R. 209; *United States v. Louisville, etc., R. Co.*, 18 Fed. R. 480; *United States v. East*

mere questions of policy and expediency the courts are not concerned. The act is entitled "An act to regulate commerce" and it was intended to and does, it has been held, cover the whole field of foreign and interstate commerce.<sup>2</sup>

§ 1667. **Construction of the interstate commerce act.**—The American courts have not, so far as our investigation enables us to determine, declared in express terms whether the interstate commerce act is to be construed strictly as against interstate carriers, but, as we shall hereafter see, the courts have, as a rule, given the act such a construction as interferes with the free right of contract and the free use of property as little as it is possible to do and yet protect the public. The English courts have construed the English statute, which is in many respects similar to the American, very liberally in favor of the public.<sup>3</sup> We think that as the act was designed to advance the interests of commerce and promote the public welfare it should be liberally construed in favor of the public, except,

Tennessee, etc., R. Co., 13 Fed. R. 642; Canada, etc., Co. v. International, etc., Co., 8 Fed. R. 190; Kaeiser v. Illinois, etc., R. Co., 18 Fed. 151; Mobile, etc., Co. v. Sessions, 28 Fed. R. 592; Illinois, etc., Co. v. Stone, 20 Fed. R. 468; Railroad Commissioners v. Railroad Co., 22 So. Car. 220; Pacific, etc., Co. v. Board of Railroad Com., 18 Fed. R. 10. See, generally, United States v. Union Pacific R. Co., 91 U. S. 72; South Carolina v. Georgia, 93 U. S. 4; Louisville, etc., R. Co. v. Railroad Com., 19 Fed. R. 679; Missouri, etc., R. Co. v. Texas, etc., R. Co., 30 Fed. R. 2. For a history and statement of the general scope and purpose of the act, see Report of The Commission; 1 Interst. Com. Com. 260; Louisville, etc., R. Co. v. Nashville, etc., R. Co., 1 Interst. Com. Com. 64. All the decisions determining questions arising upon the

act proceed upon the theory that it is valid.

<sup>1</sup>24 U. S. Statutes at Large 379, 25 U. S. Statutes at Large 855.

<sup>2</sup>Texas, etc., R. Co. v. Interst. Com. Com., 162 U. S. 197, s. c. 16 Sup. Ct. R. 666. But while the statement in the case cited is a very broad one, we suppose that the interstate commerce act can not be regarded as containing the only federal legislation upon the subject of interstate commerce, nor the whole law upon the subject, for there are other statutes upon the subject, as, for instance, the act of March, 1873, U. S. Statutes, §§ 4386, 4390, and the act in relation to the regulation of the sale of intoxicating liquors.

<sup>3</sup>Caledonian, etc., R. Co. v. North British, etc., R. Co., 3 Nev. & Macq. R. Cas. 403; Belfast, etc., R. Co. v. Great Northern, etc., R. Co., 3 Nev. & Macq. R. Cas. 419.

perhaps, where it tends to abridge the right of contract or restrict the use of property, and there, while the construction should be reasonable, it should not be so strict as to unnecessarily limit the right to contract. The act was not designed to benefit carriers but to promote the public good, and as this is its object it should be liberally construed in favor of the public.<sup>1</sup> But while the act is to be liberally construed in favor of the public the construction can not justly be such as will unnecessarily abridge the right of contract or the right to the enjoyment of property. The scope of the act is very broad and comprehensive, and includes all foreign and interstate commerce, and all its instrumentalities and agencies.<sup>2</sup> The act has not, however, as yet been so fully considered as to justify the statement of many general rules, but some of its provisions have received authoritative construction. Thus, it has been held that, a railroad company which enters into an arrangement with other companies and under such arrangement receives goods brought from another state, is part of a continuous line "under a common control, management or arrangement for a continuous carriage or shipment."<sup>3</sup> It has been held that in construing the act the

<sup>1</sup> *Kentucky Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. R. 567.

<sup>2</sup> In *Texas, etc., R. Co. v. Interstate Com. Com.*, 162 U. S. 197, s. c. 16 Sup. Ct. R. 666, 672, the court in speaking of the act said: "It would be difficult to use language more unmistakably signifying that congress had in view the whole field of commerce (excepting commerce wholly within a state), as well that between states and territories as that going to or coming from foreign countries."

<sup>3</sup> *Cincinnati, etc., R. Co. v. Interst. Com. Com.*, 162 U. S. 184, s. c. 16 Sup. Ct. R. 700, distinguishing *Chicago, etc., R. Co. v. Osborne*, 52 Fed. R. 912 (s. c. 4 Interst. Com. R. 257), and affirming *Interstate Com. Com. v. Cincinnati, etc., R.*, 56 Fed. R. 925.

In the case first cited it was said: "All we wish to be understood to hold is that when goods are shipped under a through bill of lading from a point in one state to a point in another, and when such goods are received in transit by a state common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment, within the meaning of the act to regulate commerce. When we speak of a 'through bill of lading,' we are referring to the usual method in use by connecting carriers, and must not be understood to imply that a common control, management, or arrangement might not be otherwise manifested." It has, however,

interest of the interstate carrier is a proper matter for consideration,<sup>1</sup> and this ruling forbids a construction that would deprive carriers of the right of contract or of the right of property without due process of law. It has been held that the clause "common control, management or arrangement for continuous shipment," was intended to cover all interstate traffic over all railroad lines as well as over part water and part railroad transportation.<sup>2</sup>

§ 1668. The police power as affected by the commerce clause.

—We have elsewhere considered the question of the nature of the police power of the states, and, to some extent, discussed the question of the limitations imposed upon the police power by the commerce clause of the federal constitution,<sup>3</sup> but the question requires a somewhat fuller consideration in connection with the subject of this chapter. In a late case it was held that a state statute prohibiting the running of trains on Sunday was a valid exercise of the police power of the state, and was not a violation of the commerce clause of the federal constitution.<sup>4</sup> There is, we say with deference, reason for

been held that a mere "through booking" is not an "arrangement" within the meaning of the statute. *Ayr Harbor, etc., v. Glasgow R. Co.*, 4 R. & Canal Traf. Cas. 81.

<sup>1</sup> In the case of *Interstate Com. Com. v. Louisville, etc., R. Co.*, 73 Fed. R. 409, 420, it was said: "It was at one time thought doubtful whether the interests of the railway could be taken into consideration but it is now established that they can be. *Interstate Com. Com. v. Baltimore, etc., R. Co.*, 43 Fed. R. 37; *Ames v. Union, etc., R. Co.*, 64 Fed. 176; *Reagan v. Mercantile Trust Co.*, 154 U. S. 413, s. c. 14 Sup. Ct. R. 1047."

<sup>2</sup> *Railroad Commission v. Clyde, etc., Co.*, 5 Interst. Com. Com. R. 326.

<sup>3</sup> *Ante*, §§ 658, 663-666, 667, 668.

<sup>4</sup> *Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. R. 1086, affirming;

*Hennington v. State*, 90 Ga. 396, 17 S. E. R. 1009. The court cited the cases of *Mugler v. Kansas*, 123 U. S. 623, 661, s. c. 8 Sup. Ct. R. 273; *Minnesota v. Barber*, 136 U. S. 313, 320, s. c. 10 Sup. Ct. R. 862; *Ex parte Newman*, 9 Cal. 502; *Bloom v. Richards*, 2 Ohio St. 387, 392; *Specht v. Commonwealth*, 8 Pa. St. 312; *Commonwealth v. Has*, 122 Mass. 40; *Frolickstein v. Mobile*, 40 Ala. 725; *Scales v. State*, 47 Ark. 476, 482, s. c. 1 S. W. R. 769; *State v. Ambs*, 20 Mo. 214; *Mayor of Nashville v. Linck*, 12 Lea 499, 515; *Gibbons v. Ogden*, 9 Wheat. 1, 203, 210; *Pound v. Turck*, 95 U. S. 459, 463; *Willson v. Black Bird, etc., Co.*, 2 Pet. 245, 251, 252; *Gilman v. Philadelphia*, 3 Wall. 713; *Cooley v. The Board, etc.*, 12 How. 299; *Owners of Brig James Gray v. Owners, etc.*, 21 How. 184; *Railroad Co. v. Fuller*, 17 Wall. 560,

questioning the soundness of the decision of the court in the case referred to, for it is difficult to perceive why the prohibition against running trains on Sunday is not essentially a regulation of interstate commerce.<sup>1</sup> We do not, of course, doubt the power of a state legislature to prohibit the conduct of ordinary business on Sunday, but it does seem to us that interdicting the running of interstate trains on a specified day through a state is a regulation of interstate commerce. If a legislature may prohibit the running of trains on one day, it is not easy to see why it may not, at its pleasure, choose the day, nor why, if it may select one day, it may not select more than one day. If the power to prohibit the running of trains be conceded to the state legislature, then it would seem that the right to select the day or determine the number of days is a matter of legislative discretion. But while there is reason for questioning the soundness of the decision, there is, nevertheless, much force in the argument by which the conclusion of the court is supported. It is true—as the court affirms—that a state statute, although it may affect interstate commerce, is not necessarily a regulation of that commerce, and if the statute was not a regulation of interstate commerce the decision is unquestionably right. The majority of the court in the case upon

567; *Railroad Co. v. Husen*, 95 U. S. 465, 470; *Morgans's, etc., Co. v. Louisiana Board, etc.*, 118 U. S. 455, s. c. 6 Sup. Ct. R. 1114; *Henderson v. Mayor, etc.*, 92 U. S. 259; *New Orleans, etc., Co. v. Louisiana, etc., Co.*, 115 U. S. 650, s. c. 6 Sup. Ct. R. 252; *Smith v. Alabama*, 124 U. S. 465; *Sherlock v. Alling*, 93 U. S. 99; *Nashville, etc., Co. v. Alabama*, 128 U. S. 96, s. c. 9 Sup. Ct. R. 28. See, also, *State v. Railroad Co.*, 24 W. Va. 783.

<sup>1</sup>In the case referred to, Fuller, C. J., in his dissenting opinion, said: "Intercourse and trade between the states by means of railroads passing through several states, is a matter national in its character and admitting

of uniform regulation. The power of congress to regulate it is exclusive, and under the constitution it is free and untrammelled, except as congress otherwise provides. This statute, in requiring the suspension of interstate commerce for one day in the week, amounting to a regulation of that commerce, and is invalid because the power of congress in that regard is exclusive. But it is said that the act is not a regulation of commerce, but a mere regulation of police, and that the so-called police power of a state is plenary. The result, however, is the same. When a power of a state and a power of the general government come into collision, the former must give way."

which we are commenting proceeded upon the theory that the statute under consideration did not establish a regulation of interstate commerce, and for that reason was not within the constitutional interdiction.<sup>1</sup> A very important doctrine was declared in another recent case.<sup>2</sup> In the case to which we refer it was adjudged that a statute of the state of Illinois, which required an interstate railroad passenger and mail train to run three and one-half miles in order to stop at a station for which reasonable facilities had been provided, was void because it was not a reasonable exercise of the police power, and was an unreasonable obstruction of interstate commerce. It seems to follow from the principle asserted in the case under immediate consideration, and in other cases, that, as elsewhere said,<sup>3</sup> the controlling question is as to whether the statute is a regulation of interstate commerce. There can be no doubt that the states neither delegated to the general government the police power, nor surrendered it, but, on the other hand, there can be no doubt that the commerce clause of the federal constitution does carry to the general government the subject of commerce among

<sup>1</sup> In the course of the majority opinion it was said: "The argument in behalf of the defendants rests upon the erroneous assumption that the statute of Georgia is such a regulation of interstate commerce as is forbidden by the constitution, without reference to affirmative action by congress, and not merely a statute enacted by the state under its police power, and which, although in some degree affecting interstate commerce, does not go beyond the necessities of the case, and therefore is void, at least until congress interferes." It was also said: "We are of opinion that such a law, although in a limited degree affecting interstate commerce, is not, for that reason, a needless intrusion upon the domain of federal jurisdiction, nor strictly a regulation of interstate commerce."

<sup>2</sup> *Illinois Central R. Co. v. Illinois*, 163 U. S. 142, 16 Sup. Ct. R. 1096, re-

versing *Illinois Central R. Co. v. People*, 143 Ill. 434, s. c. 33 N. E. R. 173. See *ante*, § 668, note 5. In the case cited the court referred to the following cases: *Railroad Co. v. Richmond*, 19 Wall. 584, 589; *Stone v. Farmers' Trust Co.*, 116 U. S. 307, s. c. 6 Sup. Ct. R. 334, 388; *Smith v. Alabama*, 124 U. S. 465, s. c. 8 Sup. Ct. R. 564; *Union Pac. Railroad Co. v. Hall*, 91 U. S. 343; *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418, s. c. 10 Sup. Ct. R. 462, 702. In the case first cited it was said: "The state may make reasonable regulations to secure the safety of passengers, even on interstate trains, while within its borders. But the state can do nothing that will burden or impede the interstate traffic of the company or impair the usefulness of its facilities for such purpose."

<sup>3</sup> *Ante*, §§ 658, 667.

the several states with all its incidents, so that the conclusion must be that the states can not, by statutes professedly passed in the exercise of the police power, defeat the supreme power expressly and entirely vested in the nation.<sup>1</sup> The power of a state to enact police regulations is limited, as are all other legislative powers, and, "every exercise of the police power must be reasonable and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class."

§ 1669. **State statutes held to be regulations of interstate commerce.**—Many of the cases heretofore referred to by us adjudge state statutes to be invalid, and it is not our purpose to again consider those cases, nor, indeed, shall we attempt to consider all the cases not heretofore discussed. The rule in regard to a state statute which assumes to regulate interstate commerce was clearly declared in a case in which it was held that a state statute prescribing a penalty for charging or collecting a greater sum than that specified in the bill of lading was held void because it was a regulation of commerce among the several states.<sup>3</sup> The general question was well considered by the supreme court of Iowa and it was held that a state statute assuming to give a right of action for the recovery of over-

<sup>1</sup> *Western Union Tel. Co. v. James*, (Civil Rights Cases) 109 U. S. 3; 162 U. S. 650, 16 Sup. Ct. R. 934; *Kimmish v. Ball*, 129 U. S. 217, s. c. 9 Sup. Ct. R. 277; *Railroad Co. v. Husen*, 95 U. S. 465. *In re Rahrer*, 140 U. S. 545, s. c. 11 Sup. Ct. R. 865; *Plumley v. Massachusetts*, 155 U. S. 461, s. c. 15 Sup. Ct. R. 451; *United States v. Knight Co.*, 156 U. S. 1, 11, s. c. 15 Sup. Ct. R. 249; *New Orleans, etc., Co. v. Louisiana, etc., Co.*, 115 U. S. 650, s. c. 6 Sup. Ct. R. 252; *Peete v. Morgan*, 19 Wall. 581, 682; *Kidd v. Pearson*, 128 U. S. 1, s. c. 9 Sup. Ct. R. 6; *United States v. DeWitt*, 9 Wall. 41; *United States v. Reese*, 92 U. S. 214; *United States v. Cruikshank*, 92 U. S. 542; *United States v. Stanley*, (Slaughter-house Cases, 16 Wall. 36; *Reading Railroad Co. v. Pennsylvania*, (State Freight Tax) 15 Wall. 232; *Webber v. Virginia*, 103 U. S. 344; *Patterson v. Kentucky*, 97 U. S. 501; *People v. Rock Island, etc., R. Co.*, 71 Fed. R. 753; *Crutcher v. Kentucky*, 141 U. S. 47, s. c. 11 Sup. Ct. R. 851; *Ex parte Loeb*, 72 Fed. R. 657.

<sup>2</sup> *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. R. 1138, citing *Yick Wo v. Hopkins*, 118 U. S. 356.

<sup>3</sup> *Gulf, etc., R. Co. v. Hefley*, 158 U. S. 98, s. c. 15 Sup. Ct. R. 802; *St. Louis, etc., R. Co. v. Carden*, (Tex. Civ. App.) 34 S. W. R. 145.



charges on shipments of freight in cases of an alleged unjust discrimination was invalid.<sup>1</sup> It has often been held that state statutes which prohibit the transportation of Texas cattle through the state are regulations of commerce among the several states and are in conflict with the federal constitution.<sup>2</sup> It has been held, and rightly, that a state statute which prohibits interstate railroad companies from charging a greater rate for hauling freight a shorter distance than the rate charged for hauling freight a greater distance on the same line of road violates the federal constitution and is void.<sup>3</sup> In a recent case the supreme court of Nebraska fully considered the question of the power of a state to regulate interstate commerce and held void a state statute which assumed to require a railroad

<sup>1</sup> *Gatton v. Chicago, etc., R. Co.*, (Iowa) 63 N. W. R. 589. The court professedly distinguished the cases of *Cook v. Chicago, etc., R. Co.*, 81 Iowa 551, s. c. 46 N. W. R. 1080; *Fuller v. Chicago, etc., R. Co.*, 31 Iowa 187, 209, but practically overruled much of the doctrine asserted in *Cook v. Chicago, etc., R. Co.* The decision of the court was mainly rested upon the cases of *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557, s. c. 7 Sup. Ct. R. 4, and *Hart v. Chicago, etc., R. Co.*, 69 Iowa 485, s. c. 29 N. W. R. 597. Reference was also made to *Carton v. Illinois, etc., R. Co.*, 59 Iowa 148, s. c. 13 N. W. R. 67, and to *Mr. Draper William Lewis' Federal Power over Commerce*, 122, 123. In the course of the opinion the court quoted with approval the statement that: "The inaction of congress with reference to legislation touching interstate commerce is equivalent to a declaration that such commerce shall be free and untrammelled."

<sup>2</sup> *Kimmish v. Ball*, 129 U. S. 217, s. c. 9 Sup. Ct. R. 277; *Minnesota v. Barber*, 136 U. S. 313, s. c. 10 Sup. Ct.

R. 862; *Brown v. Piper*, 91 U. S. 37; *Railroad Co. v. Husen*, 95 U. S. 465; *State v. Klein*, 126 Ind. 68; *Adams Ex. Co. v. Board, etc.*, 65 How. Pr. 72; *Gilmore v. Hannibal, etc., R. Co.*, 67 Mo. 323; *State v. Railroad Co.*, 24 W. Va. 783; *Grimes v. Eddy*, 126 Mo. 168, s. c. 28 S. W. R. 756; *Selvege v. St. Louis, etc., R. Co.*, (Mo.) 36 S. W. R. 652. In the case first cited, *Bradford v. Floyd*, 80 Mo. 207, was overruled. See, as to judicial knowledge, *Missouri, etc., R. Co. v. Finley*, 38 Kan. 550, s. c. 16 Pac. R. 951; *Patee v. Adams*, 37 Kan. 133, s. c. 14 Pac. R. 505. As to the liability of railroad carriers for transporting diseased cattle, see *Frye v. Chicago, etc., R. Co.*, 73 Ill. 399. Refusal to receive diseased cattle, see *Chicago, etc., R. Co. v. Erickson*, 91 Ill. 613; *Chicago, etc., R. Co. v. Gasaway*, 71 Ill. 570. See *ante*, § 1547.

<sup>3</sup> *McGuigan v. Wilmington, etc. R. Co.*, 95 N. Car. 428. It seems to us that the doctrine of the case cited is in conflict with the doctrine of *Bagg v. Wilmington, etc., R. Co.*, 109 N. Car. 279, s. c. 14 S. E. R. 79.

company to carry freight over longer lines at the same rates as those charged by companies whose lines were shorter.<sup>1</sup>

§ 1670. State statutes held not to be regulations of interstate commerce.—It is our purpose to refer to some of the cases in which state statutes, although affecting the agencies of commerce among the several states, have been held valid, and this we do for the reason that it is almost impossible to state general rules that will be of any practical utility. It is held in a recent case that a state statute prescribing a penalty for the failure to promptly deliver telegraph messages coming into the state from another state is valid.<sup>2</sup> Consolidation of railroad corporations is a matter for state regulation, and a state statute prohibiting the consolidation of companies owning parallel railroads does not violate the commerce clause of the federal constitution.<sup>3</sup> In a Virginia case it was held that a state

<sup>1</sup> *State v. Sioux City, etc., R. Co.*, 46 Neb. 682, 31 L. R. A. 47, citing, among other cases, *Ames v. Union, etc., R. Co.*, 64 Fed. R. 65, s. c. 4 Interst. Com. R. 835; *Paxton v. Farmers', etc., Co.*, 45 Neb. 884, s. c. 29 L. R. 853.

<sup>2</sup> *Western Union Tel. Co. v. James*, 162 U. S. 650, 16 Sup. Ct. R. 934. In the case cited the court distinguished the case of *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, s. c. 7 Sup. Ct. R. 1126, but it seems to us that there is no distinction and that the last decision is right and the earlier decision is wrong. See *Western Union Tel. Co. v. Lark*, (Ga.) 23 S. E. R. 118. Upon the point that the states can not encroach upon the powers of the federal government, the court cited, among others, the cases of *Walling v. Michigan*, 116 U. S. 446, 460, s. c. 6 Sup. Ct. R. 252; *Gulf, etc., R. Co. v. Hefley*, 158 U. S. 98, s. c. 15 Sup. Ct. R. 802. The court also referred to the case of *Covington, etc., Co. v. Kentucky*, 154 U. S. 204, s. c. 14 Sup. Ct. R. 1087, where it was said,

"The adjudications of this court with respect to the power of the state over the general subject of commerce are divided into three classes: First, those in which the power of the state is exclusive; second, those in which the states may act in the absence of legislation by congress; third, those in which the power of congress is exclusive, and the state can not interfere at all." The court also distinguishes the case of *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, s. c. 14 Sup. Ct. R. 1098.

<sup>3</sup> *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 16 Sup. Ct. R. 714, affirming *Louisville, etc., R. Co. v. Commonwealth*, (Ky.) 31 S. W. R. 476. The question of the right to prohibit the consolidation of parallel lines is discussed in the cases first above cited, and the cases of *Hancock v. Louisville, etc., R. Co.*, 145 U. S. 409, s. c. 12 Sup. Ct. R. 969; *Pear-sall v. Great Northern Ry.*, 161 U. S. 646, 16 Sup. Ct. R. 705, are cited. In the case last named the court very fully

statute providing in substance that a carrier accepting anything for transportation directed to a destination beyond the terminus of its own line or route shall be deemed thereby to assume an obligation for its safe carriage to the place of destination, unless, at the time of such acceptance, the carrier, by a contract signed by the consignor, be released from liability.<sup>1</sup> We are inclined to regard the decision in the case referred to as erroneous, for it seems to us that compelling an interstate carrier to assume responsibility for the acts of other interstate carriers is laying a burden upon commerce among the several states.<sup>2</sup> It seems to us that requiring an interstate carrier to assume a burden that does not exist at common law, but is wholly the creation of statute, does "impede and obstruct commerce among the several states," and if it does it certainly is opposed to the rule declared by the decisions of the supreme court of the United States. A requirement that one company shall be responsible for the acts of another company, although the latter company is a corporation of another state,

considers the question of the right to consolidate, and enforces the rule of strict construction. The case of *Cleveland v. Spencer*, 73 Fed. R. 559, has an important bearing upon the question of the consolidation of railroad companies. In *Pearsoll v. Great Northern Ry. Co.*, 161 U. S. 646, it was also held that the grant of an exclusive privilege can not be presumed, citing, among other cases, *Pennsylvania R. Co. v. Miller*, 132 U. S. 75, s. c. 10 Sup. Ct. R. 34; *Providence Bank v. Billings*, 4 Pet. 514; *Turnpike Co. v. State*, 3 Wall. 210.

<sup>1</sup> *Richmond, etc., R. Co. v. Patterson, etc., Co.*, (Va.) 24 S. E. R. 261, citing *Western U. Tel. Co. v. Tyler*, 90 Va. 297, s. c. 18 S. E. R. 280; *Talbott v. Merchants', etc., Transportation Co.*, 41 Iowa 247; *Sherlock v. Alling*, 93 U. S. 99. Much to the same effect is the decision in *McCann v. Eddy*, (Mo.) 33 S. W. R. 71, citing

*Solan v. Chicago, etc., R. Co.*, (Iowa) 63 N. W. R. 692; *Bagg v. Wilmington, etc., R. Co.*, 109 N. Car. 279, s. c. 14 S. E. R. 79. In the case last cited the court referred to the cases of *Martin v. Hunter*, 1 Wheat. 304; *State v. Moore*, 104 N. Car. 714, s. c. 10 S. E. R. 143; *Train v. Boston Disinfecting Co.*, 144 Mass. 523, s. c. 11 N. E. R. 929; *Wilson v. McNamee*, 102 U. S. 572; *Inman, etc., Co. v. Tinker*, 94 U. S. 238; *Philadelphia, etc., Co. v. Pennsylvania*, 122 U. S. 326; *Asher v. Texas*, 128 U. S. 129, s. c. 9 Sup. Ct. R. 1, and other cases. As indicated in the text, we regard the doctrine declared as unsound.

<sup>2</sup> *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, s. c. 7 Sup. Ct. R. 1126; *Gulf, etc., R. Co. v. Hefley*, 158 U. S. 98, s. c. 15 Sup. Ct. R. 802; *Gatton v. Chicago, etc., R. Co.*, (Iowa) 63 N. W. R. 589.

can not, as we conceive, be regarded as a police regulation, but, on the contrary, is a regulation of the right to contract for the transportation of articles of interstate commerce, and, as the regulation directly affects the instrumentalities of commerce, it is one the state has no power to make. A statute requiring an interstate railroad carrier to take upon itself responsibility for the acts of the carrier of another state is essentially different from a statute forbidding carriers to limit their common-law liability. The principle involved is the same as if a state should require an interstate carrier to run trains beyond the state in a designated mode. In a Kentucky case it was held that the provision of the state constitution prohibiting railroad companies from limiting their common-law liability was not in conflict with the commerce clause of the federal constitution.<sup>1</sup> In the case referred to the court proceeds upon the theory that the state has power to prescribe remedies and to provide what shall or shall not be a valid contract, and this theory seems tenable. The case is close to the line, and some of the statements are probably too broad, but we are inclined to think that the conclusion reached is correct, for the adjudged cases recognize the power of the states to prescribe what contracts may be made with public carriers,<sup>2</sup> and analogous cases have affirmed that state statutes regulating contracts may be valid although they concern subjects over which congress is given jurisdiction.<sup>3</sup> A similar question arose in a

<sup>1</sup> Ohio, etc., *R. Co. v. Tabor*, (Ky.) 36 S. W. R. 18, citing *Owen v. Louisville, etc., R. Co.*, 87 Ky. 626, s. c. 9 S. W. R. 968; *Peik v. Chicago, etc., Ry. Co.*, 94 U. S. 164.

<sup>2</sup> In many cases it has been held that statutes forbidding public carriers from limiting their common-law liability are valid. *Liverpool, etc., Co. v. Phenix Ins. Co.*, 129 U. S. 397; *McDaniel v. Chicago, etc., R. Co.*, 24 Iowa 412; *Hart v. Chicago, etc., R. Co.*, 69 Iowa 485, s. c. 29 N. W. R. 597.

<sup>3</sup> *New v. Walker*, 108 Ind. 365, s. c. 9 N. E. R. 386; *Tod v. Wick*, 36 Ohio

St. 370; *Haskell v. Jones*, 86 Pa. St. 173. The authorities are reviewed in an able opinion by Baker, J., in *Reeves v. Corning*, 51 Fed. R. 774. Among the cases there referred to are the following: *Patterson v. Kentucky*, 97 U. S. 501; *In re Brosnahan*, 18 Fed. R. 62; *Jordan v. Overseers*, 4 Ohio 295; *Webber v. Virginia*, 103 U. S. 344; *Castle v. Hutchinson*, 25 Fed. R. 394; *Barbier v. Connolly*, 113 U. S. 27, s. c. 5 Sup. Ct. R. 357; *Powell v. Pennsylvania*, 127 U. S. 678, s. c. 8 Sup. Ct. R. 992.

Wisconsin case, and it was held that a state statute forbidding public carriers from limiting their common-law liability did not contravene the provisions of the federal constitution.<sup>1</sup>

§ 1671. **Interstate commerce.**—Any commerce which crosses a state line and concerns more states than one is interstate commerce, but unless more than one state is concerned, or the transit is in part over the high seas, the commerce is not interstate although a state line is crossed, for commerce which entirely originates and wholly ends in one state is domestic commerce notwithstanding the fact that in the transit a state line is crossed.<sup>2</sup> If, however, the transit is from one state to another the commerce is interstate, and commerce is not domestic commerce when it is over the high seas.<sup>3</sup> It is, perhaps,

<sup>1</sup> *Davis v. Chicago, etc., R. Co.*, (Wis.) 67 N. W. R. 16, and 1132. The case referred to quotes from the opinion in *Liverpool, etc., Co. v. Phenix Ins. Co.*, 129 U. S. 397, 439, s. c. 4 Sup. Ct. R. 469, the following: "The constitutional grant to congress of the power to regulate commerce did not *superse*de or *displace* the common law, but conferred upon congress the power to make such regulations as it saw fit; and until congress acts in the premises, the *principles of the common law* governing such contracts apply, and can not be regarded as obnoxious to the objection that they are regulations of commerce, within the meaning of the constitutional provision. *Railroad Co. v. Pratt*, 22 Wall. 123, 134; *Railway Co. v. Stevens*, 95 U. S. 655; *Bank of Kentucky v. Adams Ex. Co.*, 93 U. S. 174; *Phenix, etc., Co. v. Erie, etc., Co.*, 117 U. S. 312, s. c. 6 Sup. Ct. R. 750, 1156."

<sup>2</sup> *Ante*, § 690; *Ex parte Koehler*, 30 Fed. R. 867; *Lehigh, etc., R. Co. v. Pennsylvania*, 145 U. S. 192; *Campbell v. Chicago, etc., R. Co.*, 86 Iowa 587; *State v. Western Union Tel.*

*Co.*, 113 N. Car. 213; *Leavell v. Western Union Tel. Co.*, 116 N. Car. 211, s. c. 47 Am. St. R. 798; *Campbell v. Chicago, etc., R. Co.*, 86 Iowa 587, s. c. 4 Interst. Com. R. 203, 17 L. R. A. 443; *Scammon v. Kansas City, etc., R. Co.*, 41 Mo. App. 194; *Cutting v. Florida, etc., R. Co.*, 46 Fed. R. 641; *Missouri, etc., R. Co. v. Cape Girardeau, etc., Co.*, 1 Interst. Com. R. 607; *Downing v. Alexandria*, 10 Wall. 173; *Louisville, etc., Ry. Co. v. Mississippi*, 133 U. S. 587; *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557; *Heck v. East Tennessee, etc., R. Co.*, 1 Interst. Com. R. 775. See *State v. Chicago, etc., R. Co.*, 40 Minn. 267, s. c. 41 N. W. R. 1047; *Commonwealth v. Lehigh, etc., R. Co.*, (Pa. St.) 17 Atl. R. 179; *New Orleans, etc., Exchange v. Cincinnati, etc., R. Co.*, 2 Interst. Com. R. 289; *Sternberger v. Cape Fear, etc., Co.*, 29 S. Car. 510, s. c. 2 L. R. A. 105.

<sup>3</sup> *Lord v. Steamship Co.*, 102 U. S. 541; *Cowden v. Pacific, etc., Co.*, 94 Cal. 470, s. c. 28 Am. St. R. 142; *Carpenter v. Schooner Emma Johnson*, 1 Cliff. (U. S. C. C.) 633; *Pacific, etc., Co. v. Board of Railroad Commission-*

unsafe to affirm, in view of the conflict in the decisions,<sup>1</sup> that the federal power over interstate commerce is absolutely exclusive and that silence or inaction on the part of the general government invariably forbids action by the states, but we think that where the subject is one that requires uniform regulation, inaction or silence on the part of congress does not justify action by the states, since, if there may be action by the states, uniformity is broken and the chief object of the constitution defeated. It is over interstate commerce, and not internal or domestic commerce, that the federal power extends and over interstate commerce the federal power is supreme.<sup>2</sup> Where the subject is national and admits of only one uniform system, then, as we believe, the federal power is exclusive, and inaction by congress does not authorize action by the states in the form of regulations of commerce among the several states since inaction on the part of congress implies that the commerce shall be free and untrammelled.<sup>3</sup> The

ers, 18 Fed. R. 10. See *Missouri, etc., R. Co. v. Sherwood*, 84 Tex. 125, s. c. 17 L. R. A. 643, 4 Interst. Com. R. 240.

<sup>1</sup>*Cooley v. Board of Wardens*, 12 How. 299; *Welton v. State*, 91 U. S. 275; *Bowman v. Chicago, etc., R. Co.*, 125 U. S. 465; *County of Mobile v. Kimball*, 102 U. S. 691; *Leisy v. Hardin*, 135 U. S. 100; *Brown v. Houston*, 114 U. S. 622; *In re Rahrer*, 140 U. S. 545; *Stoutenburgh v. Hennick*, 129 U. S. 141; *Robbins v. Shelby County Taxing District*, 120 U. S. 489; *Hennington v. State*, (U. S. Sup. Ct. District) 163 U. S. 299, 16 Sup. Ct. R. 1086; *Western Union, etc., Co. v. James*, 162 U. S. 650, 16 Sup. Ct. R. 934.

<sup>2</sup>*Ante*, § 690; *Wisconsin v. Duluth*, 96 U. S. 379; *Veazie v. Moor*, 14 How. 568, 574; *California v. Central Pac. Railroad Co.*, 127 U. S. 1; *Brown v. State*, 12 Wheat. 419; *The City of Salem*, 37 Fed. R. 846; *Railroad Co. v. Richmond*, 19 Wall. 584; *City of Council Bluffs v. Kansas City, etc., R. Co.*, 45 Iowa 338; *Chicago, etc., R.*

*Co. v. Chicago, etc., Co.*, 79 Ill. 121, 127; *Stockton v. Baltimore, etc., R. Co.*, 32 Fed. R. 9; *Sinnot v. Davenport*, 22 How. 227; *Foster v. Davenport*, 22 How. 244; *Iowa v. Chicago, etc., R. Co.*, 33 Fed. R. 391; *Mayor of New York v. Miln*, 11 Pet. 102, 155; *United States v. Marigold*, 9 How. 560. See *Heiserman v. Burlington, etc., R. Co.*, 63 Iowa 732.

<sup>3</sup>*Walling v. Michigan*, 116 U. S. 446; *Almy v. State of California*, 24 How. 169; *McCall v. California*, 136 U. S. 104; *Brown v. Houston*, 114 U. S. 622; *Pickard v. Pullman, etc., Co.*, 117 U. S. 34; *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489; *Welton v. State of Missouri*, 91 U. S. 275; *Sinnot v. Davenport*, 22 How. 227; *Cannon v. New Orleans*, 20 Wall. 577; *Federalist*, Nos. xxvi, xlv; *Chirac v. Chirac*, 2 Wheat. 259; *Sturges v. Crowninshield*, 4 Wheat. 122, 192; *Webster's Argument*, 9 Wheat. 9.

federal power extends to all the agencies and inseparable incidents of commerce among the several states.<sup>1</sup> It seems to be a necessary conclusion from the premises established by the decisions that a state statute which so far constitutes a regulation of interstate commerce as to impede or obstruct that commerce is an invasion of the federal dominion, and for that reason void, but there is some confusion if not conflict in the cases.<sup>2</sup>

§ 1672. The interstate commerce commission.—We have elsewhere referred incidentally to the nature and powers of the interstate commerce commission and have said that it can not be considered as a judicial tribunal in the sense that a court is a judicial tribunal.<sup>3</sup> In a recent decision of the supreme court of the United States it was held that the commission “is a body corporate with legal capacity to be a plaintiff or defendant in the federal courts.”<sup>4</sup> The commission is not in the strict sense either a judicial or legislative tribunal,<sup>5</sup> but is an instrumentality of government belonging to the administrative or ministerial department, created for the purpose of effectively aiding, under the laws of the country, in properly and justly regulating commerce between the several states. We venture to say that, while it is, in a limited sense, a body corporate it is not a corporation in the strict sense of the term. It is the

<sup>1</sup> *McCall v. California*, 136 U. S. 104; *Norfolk, etc., R. Co. v. Pennsylvania*, 136 U. S. 114; *Leloup v. Port of Mobile*, 127 U. S. 640; *Crutcher v. Kentucky*, 141 U. S. 47.

<sup>2</sup> See *Maine v. Grand Trunk, etc., R. Co.*, 142 U. S. 217; *Hennington v. Georgia*, 163 U. S. 299, s. c. 16 Sup. Ct. R. 1086.

<sup>3</sup> *Ante*, §§ 675, 676.

<sup>4</sup> *Texas, etc., R. Co. v. Interst. Com. Com.*, 162 U. S. 197, 16 Sup. Ct. R. 666. The court referred to the cases of the *Interst. Com. Com. v. Baltimore, etc., R. Co.*, 145 U. S. 264, s. c. 12 Sup. Ct. R. 844, and *Interst. Com.*

*Com. v. Atchison, etc., R. Co.*, 149 U. S. 264, s. c. 13 Sup. Ct. R. 837. The decision in the case of *Interst. Com. Com. v. Texas, etc., R. Co.*, 57 Fed. R. 948, was reversed.

<sup>5</sup> *Texas, etc., R. Co. v. Interst. Com. Com.*, 162 U. S. 197, 16 Sup. Ct. R. 666. In *Interst. Com. Com. v. Louisville, etc., R. Co.*, 73 Fed. R. 409, 414, it was said: “The investigation conducted before the commission and its order thereon are *quasi* judicial, although it may be considered as settled that the proceeding is not a judicial one, as that term is used with reference to courts of general jurisdiction.”

creature of legislation and possesses only such express powers as are conferred upon it by congress and such incidental powers as are necessary to effectuate the principal powers granted. The extent and nature of the powers of the commission have not, as yet, been defined with precision or accuracy, and we think it unsafe to attempt to lay down any general rules. The courts have held that the power of the courts to compel obedience to the "lawful order" of the commission is purely statutory, and that the courts can not modify or amend the orders of the commission, but must either refuse to compel obedience to the order made by the commission or unqualifiedly compel obedience.<sup>1</sup> It must follow from the decision in the case to which we have referred, and from general principles as well, that the commission is a special statutory tribunal with such powers as the statutes have granted it. If the powers of the established courts are statutory and special certainly those of such a tribunal as the interstate commerce commission must be statutory and special, but while this is true the powers of the commission are nevertheless very broad and comprehensive. The commission has no power either express or implied to establish maximum rates of freight.<sup>2</sup> It

<sup>1</sup> *Detroit, etc., R. Co. v. Interst. Com. Com.*, 74 Fed. 803, reversing *Interst. Com. Com. v. Detroit, etc., R. Co.*, 57 Fed. R. 1005, and citing *Stone v. Detroit, etc., R. Co.*, 3 *Interst. Com. Com. R.*, 613; *Interst. Com. Com. v. Delaware, etc., R. Co.*, 64 Fed. R. 723; *Kentucky, etc., Co. v. Louisville, etc., Co.*, 37 Fed. R. 567; *Shinkle v. Louisville, etc., R. Co.*, 62 Fed. R. 690; *Little Rock, etc., R. Co. v. East Tennessee, etc., R. Co.*, 47 Fed. R. 772; *Texas, etc., R. Co. v. Interst. Com. Com.*, 162 U. S. 197, 16 Sup. Ct. R. 666; *Interst. Com. Com. v. Baltimore, etc., R. Co.*, 43 Fed. R. 37, 50, s. c. 145 U. S. 263, 12 Sup. Ct. R. 844; *Cincinnati, etc., R. Co. v. Interst. Com. Com.*, 162 U. S. 184, 16 Sup. Ct. R. 700.

<sup>2</sup> *Cincinnati, etc., R. Co. v. Interst. Com. Com.*, 162 U. S. 184, 16 Sup. Ct. R. 700; *Interstate Com. Com. v. Cincinnati, etc., R. Co.*, 56 Fed. R. 925. The case of *Chicago, etc., R. Co. v. Osborne*, 52 Fed. R. 912, was distinguished. In commenting upon that case it was said: "All we wish to be understood to hold is that when goods are shipped under a through bill of lading from a point in one state to a point in another, and when such goods are received in transit by a state common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce." The views of Judge



has been held that: "no power is given by the act to court or commission, to compel connecting companies to contract with each other to abandon full control of their separate roads or to unite in a joint tariff."<sup>1</sup> A similar doctrine has been declared in other cases.<sup>2</sup> The orders of the commission must substantially conform to the requirements of the act of congress by which it was created. Upon this principle it has been held that it is not sufficient to state in a report general conclusions, but the report "should show what the issues in the case are and what facts it finds in regard to such issues," "should make suitable reference to the evidence," and, in short, "should give the parties to be affected, as well as the court, in any judicial proceeding afterwards instituted, definite and distinct information as to what was found as facts, and the commission's opinion thereon."<sup>3</sup>

**§ 1673. Railroads engaged in domestic commerce—When a railroad is interstate.**—A railroad company which does not

Jackson in *Interst. Com. Com. v. Baltimore, etc., Co.*, 43 Fed. R. 37, s. c. 145 U. S. 263, 12 Sup. Ct. R. 844, were adopted. The opinion of Judge Jackson was thus expressed: "Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons, or traffic similarly circumstanced, the act leaves common carriers as they were at *common law*, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits." To the same effect is the decision in *Interst. Com. Com. v. Northeastern, etc., R.*

*Co.*, 74 Fed. R. 70; *Interst. Com. Com. v. Lehigh, etc., R. Co.*, 74 Fed. R. 784.

<sup>1</sup> Per Brewer, J., in *Chicago, etc., R. Co. v. Osborne*, 52 Fed. R. 912, 915, citing *St. Louis, etc., R. Co. v. Southern Ex. Co.*, (*Express Cases*) 117 U. S. 1, s. c. 6 Sup. Ct. R. 542, 628; *Kentucky, etc., Co. v. Louisville, etc., Co.*, 37 Fed. R. 567; *Little Rock, etc., R. Co. v. St. Louis, etc., R. Co.*, 41 Fed. R. 559. See *Cincinnati, etc., R. Co. v. Interst. Com. Com.*, 162 U. S. 184, 16 Sup. Ct. R. 700.

<sup>2</sup> *Interst. Com. Com. v. Alabama, etc., R. Co.*, 74 Fed. R. 715, 723; *Texas, etc., R. Co. v. Interst. Com. Com.*, 162 U. S. 197, 16 Sup. Ct. R. 666; *Cincinnati, etc., R. Co. v. Interst. Com. Com.*, 162 U. S. 184, 16 Sup. Ct. R. 700.

<sup>3</sup> *Interst. Com. Com. v. Louisville, etc., R. Co.*, 73 Fed. R. 409, 414.

transport freight or passengers beyond the limits of the state, but is wholly engaged in carrying goods from point to point within the state, is not an instrumentality of interstate commerce and is not within the commerce clause of the federal constitution.<sup>1</sup> The fact that the lines of a company are wholly within one state does not, however, carry it out of the operation of the federal constitution, nor does it carry it out of the scope of the interstate commerce law. The test is not whether the lines of a railroad company are wholly within the boundaries of a single state, but whether the company carries freight and passengers that are destined to other states or come from other states into the state in which its lines are located.<sup>2</sup> In other words, a company which receives from connecting lines freight or passengers brought from other states, or a company that receives freight or passengers to be carried to connecting lines and by such lines transported to other states is an interstate railroad company, but a company which does business entirely within one state, is engaged in domestic commerce and is not an interstate railroad company. So, where a state carrier accepts goods for transportation upon a through bill of lading it becomes, at least as to such shipment, an interstate carrier.<sup>3</sup> In a Virginia case, however, a doctrine adverse to that stated by us was declared.<sup>4</sup> The decision in the case referred to is that a train of cars prepared and intended for the transportation of freight from a point without the state to a point within

<sup>1</sup> *Ante*, § 780.

<sup>2</sup> *Augusta, etc., R. Co. v. Wrightsville, etc., R. Co.*, 74 Fed. R. 522; *Mattingly v. Pennsylvania Co.*, 2 Interst. Com. R. 806, 812. In the case last cited the court said: "What is meant by transportation wholly within the state? The answer seems plain. It is evidently the transportation that is an element of the commerce not subject to the jurisdiction of congress. This commerce the courts say is only that which is 'confined exclusively within the jurisdiction and territory of a state, and does not

affect other nations or states or the Indian tribes, that is to say, the purely internal commerce of a state, the commerce which is wholly confined within the limits of a state.' Under this principle transportation to which the act does not apply must originate and end in the same state."

<sup>3</sup> *Cincinnati, etc., R. Co. v. Interst. Com. Com.*, 162 U. S. 184, 16 Sup. Ct. R. 700, explaining and distinguishing *Chicago, etc., R. Co. v. Osborne*, 52 Fed. R. 912.

<sup>4</sup> *Norfolk, etc., R. Co. v. Commonwealth*, (Va.) 24 S. E. R. 837.

the state was not engaged in interstate commerce. We think the decision upon the point we are discussing<sup>1</sup> is erroneous, for transportation of freight from state to state is, as has been said, "interstate commerce itself." A train used and intended for that purpose whether lying at a station or running over the road is clearly the train of an interstate commerce road and, as such, is engaged in interstate commerce. The fact that the train prepared for use in conveying property from state to state is for a time within the limits of a particular state does not strip it of its character as the train of an interstate railroad.<sup>2</sup> If it did, then taxes might be levied upon it in violation of the provisions of the federal constitution and the rights of its owners be limited and controlled according to the pleasure of the state legislature and that this can not be done is well settled.<sup>3</sup>

<sup>1</sup>In *Norfolk, etc., R. Co. v. Commonwealth*, (Va.) 24 S. E. R. 837, the court on the original hearing held that the state statute prohibiting the running of trains on Sunday violated the provisions of the federal constitution, and cited the case of *Norfolk, etc., R. Co. v. Commonwealth*, 88 Va. 95, s. c. 13 S. E. R. 340, but, on the petition for a rehearing, following the decision in *Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. R. 1086, it overruled the earlier case and held the statute valid.

<sup>2</sup>*Telegraph Co. v. Texas*, 105 U. S. 460; *Sands v. Manistee, etc., Co.*, 123 U. S. 288; *Louisville, etc., R. Co. v. Railroad Commission*, 19 Fed. R. 679; *The Daniel Ball*, 10 Wall. 557. In the case last cited it was said: "We are unable to draw any clear and distinct line between the authority of congress to regulate an agency employed in commerce between the states, when that agency extends through two or more states, and when it is confined in its action entirely within the limits of a single state. If the authority

does not extend to any agency in such commerce when that agency is confined within the limits of a state, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of the state, and leaving it at the boundary line of the other end, the federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter." See *ante*, §§ 754, 756.

<sup>3</sup>*Gibbons v. Ogden*, 9 Wheat. 1, 229; *Gloucester, etc., Co. v. Pennsylvania*, 114 U. S. 196; *California v. Central, etc., R. Co.*, 127 U. S. 1; *Bridge Co. v. United States*, 105 U. S. 470; *Stockton v. Baltimore, etc., R. Co.*, 32 Fed. R. 9; *Pensacola, etc., Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557; *Coe v. Errol*, 116 U. S. 517; *Fargo v. Michigan*, 121 U. S. 230; *Reading R. Co. v. Pennsylvania*, (State Freight Tax) 15 Wall. 279. See *ante*, §§ 658, 667, 675. As to taxation, see, *ante*, §§ 753, 784.

A provision in the charter of a railroad company declaring that it shall be subject to the laws applicable to common carriers does not affect the character of the company as an agency of interstate commerce, and if it accepts goods for transportation to another state it engages in interstate commerce and is within the dominion of the federal government under the commerce clause of the constitution.<sup>1</sup>

§ 1674. Commerce and manufactures—Monopolies—Trusts—Conspiracies.—The extent and scope of the federal power under the commerce clause of the national constitution was marked out and defined by the supreme court of the United States in the case in which the act entitled “An act to protect trade and commerce against unlawful restraints and monopolies,” came under consideration.<sup>2</sup> It was held in the case referred to that the statute did not cover cases where manufacturers entered into combinations or trusts and that the power to prevent such combinations resided in the states and was not delegated to the national government.<sup>3</sup> But it was also held that combinations so far in restraint of commerce as to create a monopoly might be suppressed by federal power. There can,

<sup>1</sup> *Houston, etc., Co. v. Insurance Co.*, (Tex.) 32 S. W. R. 889, reversing *Houston, etc., Co. v. Insurance Co.*, 31 S. W. R. 560. Upon the point that the acceptance of freight for carriage to another state constitutes a railroad company an interstate carrier the court cited *Coe v. Errol*, 116 U. S. 517, s. c. 6 Sup. Ct. R. 475; *Ex parte Koehler*, 30 Fed. R. 867; *In re Greene*, 52 Fed. R. 104; *Missouri, etc., R. Co. v. Sherwood*, 84 Tex. 125, s. c. 19 S. W. R. 455; *Harmon v. City of Chicago*, 140 Ill. 374, s. c. 29 N. E. R. 732; *Foster v. Davenport*, 22 How. 244.

<sup>2</sup> *United States v. Knight Co.*, 156 U. S. 1, s. c. 15 Sup. Ct. R. 249, affirming *United States v. Knight Co.*, 60 Fed. R. 934.

<sup>3</sup> It was said in the case cited: “That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the state.” It was also said: “Commerce succeeds to manufacture and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed, or whenever the transaction is itself a monopoly of commerce.” See *Kidd v. Pearson*, 128 U. S. 1, s. c. 9 Sup. Ct. R. 6.

therefore, be no doubt that a combination or conspiracy of interstate carriers for the purpose of improperly or unduly restraining commerce would come within the statute. If the restraint imposed or assumed to be imposed is of such a character as to create or tend to create a monopoly of commerce,<sup>1</sup> the combination would clearly be unlawful.

§ 1675. **Combinations—Pooling.**—The interstate commerce act contains stringent provisions against pooling contracts,<sup>2</sup> but we very much doubt whether the act essentially changes the common law rule. We do not doubt that the act does forbid a combination entered into for the purpose of suppressing competition or for the purpose of creating a monopoly, but we do doubt whether it prevents arrangements entered into by several carriers in good faith and for the honest purpose of maintaining just, reasonable and fair rates and preventing ruinous competition. If fair, just and reasonable rates are established, and no monopoly is created or intended to be created, we can see no reason why a combination or association should *per se* be condemned as illegal.<sup>3</sup> It is, however, with

<sup>1</sup> It was further said in the opinion in the case referred to that: "Again all the authorities agree that, in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition."

<sup>2</sup> Section 5. For a discussion of the common law rules upon the subject of "pooling arrangements," see *ante*, §§ 365, 366, 367. See, also, *Nashua, etc., Corp. v. Boston, etc., Corp.*, 19 Fed. R. 804; *Charlton v. Newcastle, etc., R. Co.*, 5 Juris, N. S. 1100; *Stanton v. Allen*, 5 Denio 434; *Central, etc., R. Co. v. Collins*, 40 Ga. 582; *Hare v. London, etc., R. Co.*, 2 Johns & H. 80; *Central Ohio, etc., Co. v. Guthrie*, 35 Ohio St. 666; *Pullman, etc.,*

*Co. v. Texas, etc., R. Co.*, 11 Fed. R. 625; *Menacho v. Ward*, 27 Fed. R. 529; *Manchester, etc., R. Co. v. Concord R. Co.*, 66 N. H. 100, s. c. 20 Atl. R. 383; *Midland Ry. Co. v. London, etc., R. Co.*, L. R. 2 Eq. 524; *Shrewsbury, etc., R. Co. v. London, etc., R. Co.*, 2 Mac. & G. 324; *Gulf, etc., R. Co. v. State*, 72 Tex. 404; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396; *Santa Clara, etc., Co. v. Hayes*, 76 Cal. 387, 18 Pac. R. 391; *Jackson v. McLean*, 36 Fed. R. 213; *Woodstock Iron Co. v. Richmond Extension Co.*, 129 U. S. 643; *Craft v. McConoughy*, 79 Ill. 346, s. c. 22 Am. R. 171; *Morrill v. Boston, etc., R. Co.*, 55 N. H. 531; *Eclipse, etc., Co. v. Ponchartrain R. Co.*, 24 La. Ann. 12; *Redfield Rys.*, § 146.

<sup>3</sup> *Duncan v. Atchison, etc., R. Co.*, 4 Interst. Com. R. 385.

much hesitation that we venture to express an opinion, and in view of the broad terms of the act and the scant authority upon the immediate question<sup>1</sup> we feel that not much weight can be assigned to our opinion. Our conclusion is, however, supported by a case in which the authorities were very carefully reviewed, and the conclusion reached by the court is well sustained by the reasoning of the court.<sup>2</sup> While there is conflict upon the general question we think the weight of authority—and sound reason as well—supports the conclusion that the law does not intend to prevent railroad carriers from entering into arrangements which to some extent may limit competition. We think that the mere fact that an arrangement is made which in some measure restrains or regulates competition is not of itself sufficient to bring the combination under the condemnation of the law, but that if the purpose or effect of the arrangement is to fetter or stifle competition, or to create a

<sup>1</sup> There are, as we have seen, many decisions upon the question under the common law rule, but very few upon the question under the statute.

<sup>2</sup> *United States v. Trans-Missouri, etc., Asso.*, 58 Fed. R. 58, distinguishing *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, s. c. 9 Sup. Ct. R. 533; *West Virginia, etc., Co. v. Ohio, etc., Co.*, 22 W. Va. 600; *Chicago, etc., Co. v. People's, etc., Co.*, 121 Ill. 530, s. c. 13 N. E. R. 169; *Western Union Tel. Co. v. American, etc., Co.*, 65 Ga. 160. In the opinion of the court in the case first cited it was said, in speaking of the cases reviewed: "But we think in view of the state of facts on which the decisions were predicated, and the points actually adjudicated, it would be unwise to deduce an unbending rule that any and every contract between two railway companies which enjoins or contemplates concert of action in the matter of establishing freight or passenger rates between competitive points is against public policy. No case, we believe, has yet

gone to that extent or has declared that the business of transporting freight and passengers by rail is of such a character that no restraint whatever upon competition therein is permissible. On the contrary, contracts between common carriers which imposed some restrictions upon competition have been frequently sustained by our highest courts, and the rule has often been applied that the test of their validity was not the existence but the reasonableness of the restriction imposed. *Oregon, etc., Navigation Co. v. Winsor*, 20 Wall. 64; *Chicago, etc., R. Co. v. Pullman, etc., Co.*, 139 U. S. 79, 11 Sup. Ct. R. 409; *Mogul, etc., Co. v. McGregor, etc., Co.*, L. R. 21 Q. B. Div. 544; *Manchester, etc., Co. v. Concord, etc., Co.*, 66 N. H. 100, s. c. 20 Atl. R. 383; *Wiggins Ferry Co. v. Chicago, etc., R. Co.*, 73 Mo. 389." See *United States v. Trans-Missouri Asso.*, 53 Fed. R. 440; *Anderson v. Jett*, 89 Ky. 375, s. c. 12 S. W. R. 670; *Beal v. Chase*, 31 Mich. 490; *In re Greene*, 52 Fed. R. 104, 115."

monopoly, or to secure or maintain unjust or unreasonable rates, or in any way to disable the railroad carrier from freely and justly performing its duty to the public the combination is illegal and should be condemned.<sup>1</sup> An agreement which empowers an association of companies to make discriminating rates for or against one of the companies has been held to be unlawful,<sup>2</sup> and, in our judgment, this ruling is right, for no railroad company can disable itself from freely and effectively performing its duties, but where there is nothing more than an association of companies, and the agreement between them has no tendency to create a monopoly, to suppress competition, or to enable the companies, or any one of them, to make discriminations or to establish unreasonable rates, the combination or association is not unlawful. The section of the interstate commerce act is not to be considered as an isolated or detached fragment separate and apart from the other provisions of the act, but, on the contrary, is to be considered in connection with all the other provisions of the act, and so, too, the purpose of the act and the object it was intended to accomplish must also receive consideration.<sup>3</sup> It is unquestionably true that the chief object of the act is to promote the interests of commerce,<sup>4</sup> and an association of companies which has in view the promotion of those interests can not, as it seems to us, be adjudged to be unlawful. The existence and successful operation of railroads is essential to commerce, and an agreement which simply prevents injury to a competing company and does no injustice to the public can not be regarded as illegal,

<sup>1</sup> *Chicago, etc., R. Co. v. Wabash, etc., R. Co.*, 61 Fed. R. 993, citing *Cleveland, etc., R. Co. v. Closser*, 126 Ind. 348, 26 N. E. R. 159; *Gulf, etc., R. Co. v. State*, 72 Tex. 404, s. c. 10 S. W. R. 81; *State v. Standard, etc., Co.*, 49 Ohio St. 137, s. c. 30 N. E. R. 279; *Texas, etc., R. Co. v. Southern, etc., R. Co.*, 41 La. Ann. 970, s. c. 6 So. R. 888; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, s. c. 9 Sup. Ct. R. 553; *Morris, etc., Co. v. Barclay, etc.,*

*Co.*, 68 Pa. St. 173; *Sayre v. Louisville, etc., Association*, 1 Duv. 143; *Hooker v. Vandewater*, 4 Denio 349. See, generally, *Homer v. Ashford*, 3 Bing. 322; *Leather Cloth Co. v. Lorisont*, 9 Eq. 345.

<sup>2</sup> *Missouri, etc., R. Co. v. Texas, etc., R. Co.*, 30 Fed. R. 2.

<sup>3</sup> *Reiche v. Smythe*, 13 Wall. 162.

<sup>4</sup> *Texas, etc., R. Co. v. Interst. Com. Com.*, 162 U. S. 197, s. c. 16 Sup. Ct. R. 666.

although it may to some extent, but not to an extent injurious to the public, restrain the right of competition.

**§ 1676. Discrimination—Undue preference—What is under the interstate commerce act.**—We have elsewhere said that the common law forbids unjust discrimination,<sup>1</sup> and much that has been said applies to the subject here under immediate mention for the reasons that the courts look to the common law to aid them in determining what is or is not an unjust discrimination, or an undue preference under the federal statute. The American courts very often refer to the English cases, and while it can not be justly affirmed that the English cases are implicitly followed since there are important differences between the English and American statutes, it is, nevertheless, true that they do exert an important, if not a controlling influence upon the decisions of our courts.<sup>2</sup> Neither at common law nor under the federal statute does the mere fact that there is a difference in rates necessarily constitute an unjust discrimination since there is no such discrimination in cases where the conditions and circumstances are essentially different. It is the English rule that in passing upon the question of undue or unreasonable preferences various facts and circumstances must be considered, and that an undue preference, within the meaning of the statute, is not shown by mere evidence of a difference in charges.<sup>3</sup> The federal

<sup>1</sup> *Ante*, §§ 1467, 1565. See, also, 1 *Hodges on Railways*, 466; *Great Western, etc., R. Co. v. Sutton*, L. R. 4 H. of L. 226; *Bayles v. Kansas, etc., R. Co.*, 13 Colo. 181; *Christie v. Missouri, etc., Co.*, 94 Mo. 453; *Concord, etc., Co. v. Forsaith*, 59 N. H. 122. We think that the terms "unjust discrimination" and "undue preference," have substantially the same meaning.

<sup>2</sup> *Interstate Com. Com. v. Louisville, etc., R. Co.*, 73 Fed. R. 409; *Interstate Com. Com. v. Baltimore, etc., R. Co.*, 43 Fed. R. 37, 145 U. S. 263, 12 Sup. Ct. R. 844. In the case of the Inter-

state Com. Com. *v. Baltimore, etc., R.*, 145 U. S. 263, s. c. 12 Sup. Ct. R. 284, it was said that the English statutes were not so comprehensive as the American, and that acts which would not constitute an unjust discrimination under English statutes might do so under the American.

<sup>3</sup> *Denaby, etc., Co. v. Manchester, etc., Co.*, L. R. 11 App. Cas. 97, 55 L. J. Q. B. 181, s. c. 26 Am. & Eng. R. Cas. 293; *Phipps v. London, etc., R. Co.*, L. R. (1892) 2 Q. B. 229; *Budd v. London, etc., Railway Co.*, 4 Ry. & Canal Tr. Cas. 393; *London, etc., R.*



courts have substantially adopted the rule declared by the English courts.<sup>1</sup> It is safe to say that there is no undue preference where there is such a difference in circumstances and conditions as constitutes an inequality that renders the discrimination just,<sup>2</sup> but what constitutes such a difference in circumstances and conditions is a question not so easily answered. Where there is a privilege granted to a favored shipper, which gives him an undue advantage over his rivals, the fact that the carrier may withdraw the privilege at its pleasure does not make the preference lawful, but, notwithstanding that fact, such a preference constitutes an undue preference within the meaning of the law.<sup>3</sup> The object of the federal statute is to prevent unjust

*Co. v. Evershed*, L. R. 3 App. Cas. 1029; *Harris v. Cockermouth, etc. Ry. Co.*, 1 Nev. & McN. 97; *Ransome v. Eastern, etc., R. Co.*, 1 Nev. & McN. 63; *Nicholson v. Great Western, etc., R. Co.*, 5 C. B. (N. S.) 366; *Baxendale v. Great Western, etc., R. Co.*, 5 C. B. (N. S.) 336, 28 L. J. C. P. 81; *Hozier v. Caledonian Ry. Co.*, 1 Nev. & McN. 27. The English cases are reviewed in *Interstate Com. Com. v. Louisville, etc., R. Co.*, 73 Fed. R. 409, and copious extracts are made from the opinions of the judges, and so they are in *Interstate Com. Com. v. Baltimore, etc., R. Co.*, 145 U. S. 263, s. c. 12 Sup. Ct. R. 844. See, generally, *Spofford v. Boston, etc., R. Co.*, 128 Mass. 326; *Ragan v. Aiken*, 9 Lea 609, s. c. 42 Am. R. 684; *Menacho v. Ward*, 27 Fed. R. 529; *Ex parte Benson*, 18 So. Car. 38, s. c. 44 Am. R. 564; *Avinger v. South Carolina, etc., R. Co.*, 29 So. Car. 265; *Fitchburg R. Co. v. Gage*, 12 Gray (Mass.) 393.

<sup>1</sup> In the case of *Interstate Com. Com. v. Baltimore, etc., R. Co.*, 145 U. S. 263, s. c. 12 Sup. Ct. R. 844, the court said: "In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike under

the same conditions and circumstances, and that any fact which produces an inequality of condition and change of circumstances justifies an inequality of charge." The act of an agent in guaranteeing that passengers will reach their place of destination at a specified time does not constitute an undue preference or unjust discrimination. *Foster v. Cleveland, etc., R. Co.*, 56 Fed. R. 434.

<sup>2</sup> *Texas, etc., R. Co. v. Interst. Com. Com.*, 162 U. S. 197, s. c. 16 Sup. Ct. R. 666; *Union Pac. R. Co. v. United States*, 117 U. S. 355, s. c. 6 Sup. Ct. R. 772; *Interst. Com. Com. v. Louisville, etc., R. Co.*, 73 Fed. R. 409; *Interst. Com. Com. v. Alabama, etc., R. Co.*, 69 Fed. R. 227; *Butchers', etc., Co. v. Louisville, etc., R. Co.*, 67 Fed. R. 35; *Detroit, etc., R. Co. v. Interst. Com. Com.*, 74 Fed. R. 803; *Interst. Com. Com. v. Alabama, etc., R. Co.*, 74 Fed. R. 715; *Cincinnati, etc., R. Co. v. Interst. Com. Com.*, 162 U. S. 184, s. c. 16 Sup. Ct. R. 700; *Interst. Com. Com. v. Atchison, etc., R. Co.*, 50 Fed. R. 295; *Junod v. Chicago, etc., R. Co.*, 47 Fed. R. 290; *Interst. Com. Com. v. Cincinnati, etc., R. Co.*, 56 Fed. R. 925.

<sup>3</sup> *Butchers', etc., Co. v. Louisville,*

discrimination against places as well as against persons, and the district attorney of the United States may maintain a suit to enjoin a railroad company from making an unjust discrimination against a city.<sup>1</sup> The cost of producing an article of commerce, as, for instance, coal, can not be considered as excusing or justifying a discrimination in favor of the producer.<sup>2</sup> Nor will a release of the carrier from an unliquidated claim for damages justify a discrimination in favor of the person who executes the release.<sup>3</sup>

**§ 1677. Preference—Discrimination—When not unjust—Difference in circumstances and conditions.**—As we have shown a mere difference in charges does not necessarily prove that there was an unjust discrimination or an undue preference, for in determining whether there was an unjust discrimination or an undue preference the conditions and circumstances of the particular case must be considered. Thus, it is proper to consider whether there were competitive rates, and this is so whether the traffic originated in foreign ports or within the limits of the United States.<sup>4</sup> So, the cost of the particular

etc., R. Co., 67 Fed. R. 35; *Interstate Com. Com. v. Alabama, etc.*, R. Co., 74 Fed. R. 715; *Detroit, etc., R. Co. v. Interst. Com. Com.*, 74 Fed. R. 803.

<sup>1</sup> *United States v. Missouri Pac. R. Co.*, 65 Fed. R. 903.

<sup>2</sup> *Union, etc., R. Co. v. Goodridge*, 149 U. S. 680, s. c. 13 Sup. Ct. R. 970; *Union, etc., R. Co. v. Taggart*, 149 U. S. 698, s. c. 13 Sup. Ct. R. 977.

<sup>3</sup> Authorities cited in preceding section.

<sup>4</sup> *Texas, etc., R. Co. v. Interst. Com. Com.*, 162 U. S. 197, s. c. 16 Sup. Ct. R. 666; *Interst. Com. Com. v. Louisville, etc., R. Co.*, 73 Fed. R. 409; *Detroit, etc., R. Co. v. Interst. Com. Com.*, 74 Fed. R. 803; *Imperial, etc., Co. v. Pittsburg, etc., R. Co.*, 2 Interst. Com. Com. R. 618. See, generally, *Parker v. Great Western R. Co.*, 7 Man. & G. 253; *Pegler v. Monmouthshire Canal*

*Co.*, 6 Hurl. & N. 644; *Palmer v. London, etc., R. Co.*, L. R. 6 C. P. 194; *Parkinson v. Great R. Co.*, L. R. 6 C. P. 554; *Liverpool, etc., Asso. v. London, etc., R. Co.*, L. R. (1891) 1 Q. B. Div. 120; *Manchester, etc., R. Co. v. Denaby, etc., Co.*, L. R. 13 Q. B. Div. 674, L. R. 14 Q. B. Div. 209; *Garton v. Great Western R. Co.*, 5 C. B. (N. S.) 669; *Palmer v. Great Western Railway Co.*, L. R. 6 C. P. 194. See, generally, as to what does or does not constitute an unjust discrimination. *Parsons v. Chicago, etc., R. Co.*, 63 Fed. R. 903; *Chicago, etc., R. Co. v. Hubbell*, 54 Kan. 232, s. c. 38 Pac. R. 266; *Michigan, etc., Co. v. Flint, etc., R. Co.*, 28 Chicago Legal News, 6; *Kelly v. Chicago, etc., R. Co.*, (Iowa) 61 N. W. R. 957; *St. Louis, etc., R. Co. v. McGill*, 64 Fed. R. 165; *Little Rock, etc., R. Co. v. St. Louis, etc.,*

service is a proper matter for consideration,<sup>1</sup> and so are many other facts and circumstances.<sup>2</sup> The fact that a joint through rate is less to a particular place than a local rate does not prove that there was an unjust discrimination or an undue preference, for "it never follows as a matter of law, that an undue preference has been given to a person or locality, because a disparity is shown to exist between a local rate and a joint rate."<sup>3</sup>

§ 1678. Undue preference—Discrimination—Illustrative instances.—Cartage furnished free to some shippers and denied to others, where circumstances and conditions are not substantially dissimilar, has been held to constitute an undue preference.<sup>4</sup> But it has been held that cartage may be "an accessorial service" and that circumstances and conditions may be such as to render free cartage proper and prevent it from constituting an undue preference.<sup>5</sup> The English courts

R. Co., 63 Fed. R. 775, s. c. 26 L. R. A. 192.

<sup>1</sup> *Interst. Com. Com. v. Lehigh, etc.*, R. Co., 74 Fed. R. 784; *Chicago, etc., R. Co. v. People*, 67 Ill. 11, s. c. 16 Am. R. 599; *Harris v. Cockermouth, etc.*, R. Co., 1 Nev. & McN. 97; *Girardot v. Midland, etc.*, R. Co., 4 R. & Canal Traf. Cas. 291. See, generally, *Foreman v. Great Eastern, etc.*, R. Co., 2 Nev. & McN. 202; *Nitshill, etc., Co. v. Caledonian R. Co.*, 2 Nev. & McN. 39; *Bellsdyke, etc., Co. v. North British R. Co.*, 2 Nev. & McN. 105; *Bell v. London, etc.*, R. Co., 2 Nev. & McN. 185; *Holland v. Festiniog, etc.*, R. Co., 2 Nev. & McN. 278; *Providence, etc., Co. v. Providence, etc.*, R. Co., 1 *Interst. Com. R.* 363; *Lotsperch v. Central, etc.*, R. Co., 73 Ala. 306, s. c. 18 Am. & Eng. R. Cas. 490; *Burton, etc., Co. v. Chicago, etc.*, R. Co., 1 *Interst. Com. R.* 329.

<sup>2</sup> *Re Religious Teachers*, 1 *Interst. Com. R.* 21; *Interst. Com. Com. v. Alabama, etc.*, R. Co., 74 Fed. R. 715;

*Houston, etc., R. Co. v. Rust*, 58 Tex. 98; *Butchers, etc., Co. v. Louisville, etc.*, R. Co., 67 Fed. R. 35.

<sup>3</sup> *Parsons v. Chicago, etc.*, R. Co., 63 Fed. R. 903.

<sup>4</sup> *Interstate Com. Com. v. Detroit, etc.*, R. Co., 57 Fed. R. 1005, (but see *Detroit, etc., R. Co. v. Interst. Com. Com.*, 74 Fed. R. 803); *Hezel, etc., Co. v. St. Louis, etc., Co.*, 5 *Interst. Com. R.* 57; *Macloon v. Chicago, etc.*, R. Co., 3 *Interst. Com. R.* 711; *Evershed v. London, etc.*, R. Co., L. R. 3 Q. B. D. 134; *London, etc., R. Co. v. Evershed*, L. R. 3 App. Cas. 1029; *Thompson v. London, etc.*, R. Co., 2 Nev. & Mac. 115; *Stone v. Detroit, etc.*, R. Co., 3 *Interst. Com. R.* 613, 3 *Interst. Com. R.* 60.

<sup>5</sup> *Detroit, etc., R. Co. v. Interst. Com. Com.*, 74 Fed. R. 803, reversing *Interst. Com. Com. v. Detroit, etc.*, R. Co., 57 Fed. R. 1005. In the case first cited it was said: "These English cases abundantly establish three propositions in relation to this subject:

hold that where some shippers have side tracks or switches connecting with their elevators, warehouses or the like, it is not an unlawful discrimination to make a reasonable allowance to such shippers on account of the saving to the carrier in the expense of loading and unloading,<sup>1</sup> but as the English statutes are different from the American, it is unsafe to implicitly

“(1) That the collecting and delivery of goods is a separate and distinct business, notwithstanding the confusion to which we have adverted; (2) that the railroad companies undertaking to do for themselves this separate business can not, by consolidating the compensation for each, avoid the restrictions that have been imposed upon them in respect of unlawful discriminations, and it is amply within the power of the railroad commissions and the courts, according to the facts of each particular case, to separate the two in order to prevent such an unlawful discrimination; (3) that notwithstanding the separable and independent character of the two services, both whether in the hands of the same or separate carriers, are subject to the rules and regulations prescribed by law to prevent unlawful discriminations.” The court cited *Pickford v. Grand Junction, etc., R.*, 10 Mees. & W. 399; *Parker v. Great Western R. Co.*, 7 Man. & G. 253; *Baxendale v. North, etc., R. Co.*, 3 C. B. (N. S.) 324; *Gaston v. Bristol, etc., R. Co.*, 1 Best. & S. 112; *Pegler v. Monmouthshire Canal Co.*, 6 Hurl. & N. 644; *Palmer v. London, etc., R. Co.*, L. R. 1 C. P. 588; *West v. London, etc., R. Co.*, L. R. 5 C. P. 622; *Parkinson v. Great Western, etc., R. Co.*, L. R. 6 C. P. 554; *Liverpool, etc., Asso. v. London, etc., R. Co.*, L. R. (1891) 1 Q. B. Div. 120; *Interstate Com. Com. v. Baltimore, etc., R. Co.*, 145 U. S. 264, s. c. 12 Sup. Ct. R. 844; *Imperial Coal*

*Co. v. Pittsburgh, etc., R. Co.*, 2 Interst. Com. Com. R. 618; *Ayres v. Chicago, etc., R. Co.*, 71 Wis. 372, s. c. 27 N. W. R. 432; *In re Catherham R. Co.*, 1 C. B. (N. S.) 410; *Railroad Com. v. Clyde, etc., Co.*, 5 Interst. Com. Com. R. 327; *Lancashire, etc., R. Co. v. Greenwood, L. R.* 21 Q. B. Div. 215; *Gerke, etc., Co. v. Louisville, etc.*, 5 Interst. Com. Com. R. 596; *Atchison, etc., R. Co. v. Denver, etc., Co.*, 110 U. S. 667, s. c. 4 Sup. Ct. R. 185; *Northern, etc., R. Co. v. Washington Ty.*, 142 U. S. 492, s. c. 12 Sup. Ct. R. 283; *Ex parte Koehler*, 23 Fed. R. 529, 25 Fed. R. 73; *Little Rock, etc., R. Co. v. St. Louis, etc., R. Co.*, 41 Fed. R. 559; *Little Rock, etc., R. Co. v. East Tennessee, etc., R. Co.*, 47 Fed. R. 771, 776.

<sup>1</sup>*Bell v. London, etc., R. Co.*, 2 Nev. & Mac. 185; *Lees v. Lancashire, etc., R. Co.*, 1 Nev. & Mac. 352. See *Robertson v. Midland, etc., R. Co.*, 2 Nev. & Mac. 409; *Thomas v. North Staffordshire R. Co.*, 3 Nev. & Mac. 1; *Locke v. North Eastern R. Co.*, 3 Nev. & Mac. 44; *Hall v. London, etc., R. Co.*, L. R. 15 Q. B. D. 505; *Watkinson v. Wrexham, etc., R. Co.*, 3 Nev. & Mac. 5. While it is true that there are in some respects essential differences between the American and English statutes, still, as has often been decided, the federal courts will look to the English decisions. *McDonald v. Hovey*, 110 U. S. 619; *McCool v. Smith*, 1 Black 459; *Pennock v. Dialogue*, 2 Pet. 1.

follow the English decisions. The English rule is that granting the use of side tracks to some shippers and denying the use of them to others is an unjust discrimination,<sup>1</sup> and this is doubtless the rule under the federal statutes in cases where the circumstances and conditions are not substantially dissimilar.<sup>2</sup> Classification arbitrarily made in cases where there is no substantial dissimilarity in circumstances or conditions will not enable a carrier to evade the provisions of the act,<sup>3</sup> nor can a carrier arbitrarily and unreasonably deprive a shipper of the natural advantages of location and surroundings.<sup>4</sup> Classifications must be made on a reasonable basis and not so made as to result in unreasonable charges, undue preferences, or unjust discriminations.<sup>5</sup> The motive of the shipper, as,

<sup>1</sup> *Beeston, etc., Co. v. Midland R. Co.*, 5 R. & Canal Traf. Cas. 53; *Girardot v. Midland R. Co.*, 5 R. & Canal Traf. Cas. 60. See *Lancashire, etc., R. Co. v. Gidlow*, L. R. 7 Eng. & I. App. 517; *Oxlade v. Northeastern, etc., R. Co.*, 1 C. B. (N.S.) 454; *East, etc., Co. v. Shaw, etc., Co.*, L. R. 39 Ch. Div. 524.

<sup>2</sup> *State v. Missouri, etc., R. Co.*, 29 Neb. 550, s. c. 45 N. W. R. 785, 3 Am. R. & Corp. R. (Lewis) 82; *Hoyt v. Chicago, etc., Railroad Co.*, 93 Ill. 601; *Chicago, etc., R. Co. v. People*, 56 Ill. 365; *Chicago, etc., R. Co. v. Suffern*, 129 Ill. 274, s. c. 21 N. E. R. 824; *Vincent v. Chicago, etc., Railroad*, 49 Ill. 33. As to the remedy by mandamus, see *People v. Louisville, etc., Railroad Co.*, 120 Ill. 48, s. c. 10 N. E. R. 657; *County of Pike v. State*, 11 Ill. 202; *City of Ottawa v. People*, 48 Ill. 233; *Union Pac. Railroad Co. v. Hall*, 91 U. S. 343.

<sup>3</sup> *Nitshill v. Caledonian, etc., R. Co.*, 2 Nev. & Mac. 39; *Coxe v. Lehigh, etc., Co.*, 3 Interst. Com. R. 460; *Hurlburt v. Lake Shore, etc., R. Co.*, 2 Interst. Com. R. 81; *Harvard Co. v. Pennsylvania Co.*, 3 Interst. Com. R.

257; *Brownell v. Columbus, etc., R. Co.*, 4 Interst. Com. R. 285; *Squire v. Michigan, etc., R. Co.*, 3 Interst. Com. R. 515. See, generally, *Dow v. Beidelman*, 125 U. S. 680; *Bates v. Pennsylvania Co.*, 2 Interst. Com. R. 715.

<sup>4</sup> *Harris v. Cockermouth, etc., R. Co.*, 3 C. B. (N. S.) 693, 27 L. J. C. P. 162; *Ransome v. Eastern, etc., R. Co.*, 4 C. B. (N. S.) 135, s. c. 1 Nev. & Mac. 109; *Diphwys v. Festiniog R. Co.*, 2 Nev. & Mac. 73.

<sup>5</sup> *Proctor v. Cincinnati, etc., R. Co.*, 3 Interst. Com. R. 131; *Pyle v. East Tennessee, etc., R. Co.*, 1 Interst. Com. R. 767; *Rice v. Western, etc., R. Co.*, 3 Interst. Com. R. 162; *Reynolds v. Western, etc., R. Co.*, 1 Interst. Com. R. 685; *Duncan v. Southern, etc., R. Co.*, 4 Interst. Com. R. 385. See, generally, *Warner v. New York, etc., R. Co.*, 3 Interst. Com. R. 74; *Andrews, etc., Co. v. Pittsburgh, etc., Co.*, 3 Interst. Com. R. 77; *Spofford v. Boston, etc., R. Co.*, 128 Mass. 326; *Sargent v. Boston, etc., R. Co.*, 115 Mass. 416; *St. Louis, etc., R. Co. v. Hill*, 4 Brad. (Ill. App.) 579; *Louisville, etc., R. Co. v. Crown, etc., Co.*, 43 Ill. App. 228; *Railway Co. v. Bruce*,

for instance, the desire to open a new avenue of trade, has been held not to be such a circumstance or condition as will authorize a discrimination in his favor.<sup>1</sup>

§ 1679. **Undue preference**—**Question one of mixed law and fact.**—In some of the decisions the question as to whether there is an undue preference is treated as one of law and not of fact. A recent decision of the supreme court of the United States seems, however, to assume that the question is purely one of fact.<sup>2</sup> We venture the opinion, but with great deference, that, in strictness, the question is generally one of mingled law and fact. Whether certain facts have or have not been established is, of course, a question of fact, but the effect of the facts when found is, as we believe, ordinarily a question

55 Ark. 65; Kauffman, etc., Co. v. Missouri, etc., R. Co., 3 Interst. Com. R. 400. As to unlawful discriminations against hackmen, draymen and carters, see *McConnell v. Pedigo*, 92 Ky. 465, s. c. 18 S. W. R. 15, 5 Am. R. & Corp. R. (Lewis) 711; *New York, etc., R. Co. v. Flynn*, 74 Hun 124, 26 N. Y. S. 859; *City of Colorado Springs v. Smith*, 19 Colo. 554, s. c. 36 Pac. R. 540. In the note to *McConnell v. Pedigo*, 5 Am. R. & Corp. R. 715, many authorities are collected upon the subject of the power of a railroad company to make reasonable rules for the government of depots and ground. Among the cases cited are *Kalamazoo, etc., Co. v. Sootsma*, 84 Mich. 194, s. c. 47 N. W. R. 667; *Landrigan v. State*, 31 Ark. 50; *Commonwealth v. Power*, 7 Metcf. 596; *Montana, etc., R. Co. v. Langlois*, 9 Mont. 419, s. c. 24 Pac. R. 209; *Cravens v. Rodgers*, 101 Mo. 247; *Old Colony, etc., R. Co. v. Tripp*, 147 Mass. 35, s. c. 17 N. E. R. 89; *Barker v. Midland, etc., R. Co.*, 18 C. B. 46; *Marriott v. London, etc., Co.*, 1 C. B.

(N. S.) 499; *Beadell v. Eastern R. Co.*, 2 C. B. (N. S.) 509.

<sup>1</sup> *Denaby, etc., Co. v. Manchester, etc., R. Co.*, L. R. 11 App. Cas. 97; *London, etc., R. Co. v. Evershed*, L. R. 3 App. Cas. 1029; *Oxlade v. North Eastern, etc., R. Co.*, 1 C. B. (N. S.) 454, 1 Nev. & Mac. 72; *Budd v. London, etc., Co.*, 4 R. & Canal Traf. Cas. 393; *Ransome v. Eastern, etc., R. Co.*, 4 C. B. (N. S.) 135, 1 Nev. & Mac. 109; *Great Western, etc., R. Co. v. Sutton*, L. R. 4 H. L. 226; *Twells v. Pennsylvania R. Co.*, 3 Am. Law Reg. (N. S.) 728. See *Missouri, etc., R. Co. v. Texas, etc., R. Co.*, 30 Fed. R. 2.

<sup>2</sup> *Texas, etc., R. Co. v. Interstate Com. Com.*, 162 U. S. 197, s. c. 16 Sup. Ct. R. 666. In the case cited it was said: "And as there is nothing in the act which defines what shall be due or undue, reasonable or unreasonable, such questions are questions not of law but of fact." It certainly has been uniformly held in analogous cases that whether a period of time or an act is reasonable or unreasonable is ordinarily a mixed question of law and fact.

of law, so that an ultimate judgment can not be reached without deciding both the questions of law and the questions of fact. When facts are ascertained their legal effect is determined by applying to them the rules of law, and, ordinarily, until the rules of law are applied the effect of the facts can not be justly determined. We suppose that if a tribunal should determine that there was an undue preference in a case where the costs of the particular service, or the like, rendered proper a legal conclusion that there was no undue preference, the decision could not stand, although the particular or tangible facts were correctly found.<sup>1</sup> It may be true in a loose sense that whether there is or is not an undue preference is a question of fact, but we think that in strict accuracy it is a question in which the elements of law and fact are component parts.

### § 1680. Rebates as affected by the interstate commerce act.

—Devices designed to enable an interstate railroad carrier to unjustly discriminate in favor of some shipper or shippers against another shipper or other shippers are forbidden by the statute. It has been held, however, that: "A rebate, drawback or special rate is not of itself unjust discrimination, for it does not necessarily follow that a like rebate, drawback or special rate has not been extended to all the patrons of the carrier."<sup>2</sup> It seems quite clear upon principle and authority<sup>3</sup> that a railroad carrier does not violate the statute by giving a rebate to one shipper, but if the rebate be given to one, and, where circumstances and conditions are substantially the same, denied to others, or if the intention is to evade the statute by discriminating in favor of one shipper and against others and a rebate is agreed upon for the purpose of carrying that intention into effect, then there would be an unjust discrimination

<sup>1</sup>The decision in *Interstate Com. R. Co., 94 Mo. 453; Root v. Long Island R. Co., 114 N. Y. 300.*  
*Com. v. Alabama, etc., R. Co., 74 Fed. R. 715,* treats the question as one purely of fact.

<sup>2</sup>*United States v. Hanley, 71 Fed. R. 672, 673; Christie v. Missouri, etc.,*  
<sup>3</sup>*Ante, § 1565; Ex parte Benson, 18 So. Car. 38; Cowdrey v. Railroad Co., 1 Woods (U. S.) 331, 335.*

within the meaning of the law.<sup>1</sup> A bill of lading is not vitiated by the granting of a rebate in violation of the interstate commerce act, nor does the granting of a rebate in violation of the statute preclude a recovery against the carrier in the event of a loss of the property.<sup>2</sup>

**§ 1681. Formation of connecting lines—Preference—Terminal facilities.**—The federal courts hold that a railroad company may, for itself, determine with what other company or companies it will make traffic contracts, and that in making a contract with one company for the formation of a through line it does not transgress the interstate commerce act.<sup>3</sup> The law does not require a railroad company to treat all companies alike without regard to its own interests either as to terminal facilities or other matters; but, while this is true, it is also true that one railroad company can not arbitrarily refuse to transport freight or passengers destined to points upon its own line. It is no doubt true, as said in one of the cases cited, in speaking of a common carrier, that, "He certainly

<sup>1</sup> *Providence Coal Co. v. Providence, etc., Co.*, 1 Interst. Com. Com. R. 107; *Martin v. Southern, etc., R. Co.*, 2 Interst. Com. Com. 1; *Kentucky Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. R. 657; *In re Louisville, etc., R. Co.*, 5 Interst. Com. Com. R. 466. See, generally, *Great Western, etc., R. Co. v. Sutton*, L. R. 4 H. L. 226; *Merry v. Glasgow, etc., R. Co.*, 4 Ry. & Canal Traf. Cas. 383; *Nitshill, etc., Co. v. Caledonian, etc., R. Co.*, 2 Nev. & Macq. 39; *Hezel, etc., Co. v. St. Louis, etc., R. Co.*, 5 Interst. Com. Com. R. 57.

<sup>2</sup> *Merchants, etc., Co. v. Insurance Co.*, 151 U. S. 368, s. c. 14 Sup. Ct. R. 367.

<sup>3</sup> *St. Louis, etc., Co. v. Louisville, etc., Co.*, 65 Fed. B. 39; *Atchison, etc., Co. v. Denver, etc., R. Co.*, 110 U. S. 667, s. c. 4 Sup. Ct. R. 185; *Pullman, etc., Co. v. Missouri Pac. R. Co.*,

115 U. S. 587, s. c. 6 Sup. Ct. R. 194; *St. Louis, etc., R. Co. v. Southern Express Co.*, (Express Cases) 117 U. S. 1, s. c. 6 Sup. Ct. R. 542, 628; *Little Rock, etc., R. v. St. Louis, etc., R. Co.*, 41 Fed. R. 559; *Oregon, etc., R. Co. v. Northern Pac. R. Co.*, 51 Fed. R. 465. In the case last cited it was said: "It follows from this that the common carrier is left free to enter into arrangements for the use of its tracks or terminal facilities with one or more lines without subjecting itself to the charge of giving undue or unreasonable preferences or advantages to such lines, or of unlawfully discriminating against other carriers. In making arrangements for such use by other companies, a common carrier will be governed by considerations of what is best for its own interests." See *post*, § 1685.



may select his own agencies and associates for doing his own work," but it can not be true that one railroad company may refuse to receive freight or passengers simply because such freight or passengers are brought to it by some company other than the one with which it has made a traffic contract. The right to refuse passengers or freight can not be made to depend upon contracts between carriers themselves except in cases where there is no duty to carry, as, for instance, where the carrier is required to transport goods beyond its own line, for where there is a duty to carry the carrier can not by contract with other carriers escape from that duty.

§ 1682. **Long and short hauls.**—Section four of the interstate commerce act provides that, except as authorized by the interstate commerce commission, it shall be unlawful to charge or receive any greater compensation in the aggregate for transportation, under substantially similar circumstances and conditions, "for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance."<sup>1</sup> It is also provided that this section shall not be construed as authorizing any common carrier "to charge and receive as great compensation for a shorter as for a longer distance." This section was intended to maintain and promote, rather than to destroy or neutralize, commercial advantages resulting from location.<sup>2</sup> Its prohibition is limited to cases in which the circumstances and conditions are substan-

<sup>1</sup> 24 U. S. St. L. 379, 1 Supp. U. S. Rev. St. 529, 530. The history of this section is given in *Re Southern R., etc.*, Assn.; 1 Interst. Com. R. 278. For somewhat similar state statutes as to railroads and carriage within the state, and the construction of such statutes, see *Wabash, etc.*, R. Co. v. Illinois, 118 U. S. 557, s. c. 7 Sup. Ct. R. 4; *People v. Wabash, etc.*, R. Co., 104 Ill. 476; *Illinois Cent. R. Co. v. People*, 121 Ill. 304, s. c. 12 N. E. R.

670; *Hines v. Wilmington, etc.*, R. Co., 95 N. Car. 434.

<sup>2</sup> *Raworth v. Northern Pac. R. Co.*, 3 Interst. Com. R. 857; *Chamber of Commerce v. Great Northern R. Co.*, 4 Interst. Com. R. 230; *Eau Claire, etc., v. Chicago, etc.*, R. Co., 4 Interst. Com. 65; *James v. Canadian Pac. R. Co.*, 4 Interst. Com. R. 274; *Ransome v. Eastern Counties R. Co.*, 4 C. B. N. S. 135. See, also, *Anthony Salt Co. v. Missouri Pac. R. Co.*, 4 Interst. Com. R. 33.

tially similar.<sup>1</sup> Among the things which may make the circumstances and conditions dissimilar and justify an equal or greater charge for a short haul than for a long haul is competition with carriers which are not subject to the provision of the statute, particularly with carriers by water.<sup>2</sup> Competition of controlling force and amount with foreign railroads or those which are wholly within one state, and free from the operation of the statute, may justify such a charge as well as competition with carriers by water,<sup>3</sup> and the interstate commerce commission originally made another exception in "rare and peculiar" cases of competition with other railroads subject to the statute where a strict application of the general rule would be de-

<sup>1</sup> *In re Louisville, etc., R. Co.*, 1 Interst. Com. Com. R. 31, 53; *Interstate Com. Com. v. Cincinnati, etc., R. Co.*, 56 Fed. R. 925; *Re Southern R., etc., Assn.*, 1 Interst. Com. R. 278; *Interstate Com. Com. v. Alabama, etc., R. Co.*, 69 Fed. R. 227. But it seems to have been held that in case of doubt it should be resolved in favor of the law and the circumstances and conditions treated as substantially similar. *Missouri Pac. R. Co. v. Texas, etc., R. Co.*, 31 Fed. R. 862. See, also, *San Bernardino, etc., v. Atchison, etc., R. Co.*, 3 Interst. Com. R. 138. But in *Detroit, etc., R. Co. v. Interstate Com. Com.*, 74 Fed. R. 803, 839, it is denied that there is any presumption against the carrier.

<sup>2</sup> *Behlmer v. Louisville, etc., R. Co.*, 71 Fed. R. 835; *Ex parte Koehler*, 25 Fed. R. 73, 31 Fed. R. 315; *Rice v. Atchison, etc., R. Co.*, 3 Interst. Com. R. 263; *Interstate Com. Com. v. Atchison, etc., R. Co.*, 50 Fed. R. 295; *Business Men's Assn. v. Chicago, etc., R. Co.*, 2 Interst. Com. Com. R. 52; *King v. New York, etc., R. Co.*, 3 Interst. Com. R. 272; *New Orleans, etc., v. Illinois Cent. R. Co.*, 3 Interst. Com. Com. R. 534; *Lehmann v. Southern Pac. R. Co.*, 3 Interst. Com. R. 80. But

where the only real competition is by rail it seems that the fact that water competition is also possible will not make the circumstances and conditions dissimilar. *Boston, etc., R. Co. v. Boston, etc., Co.*, 1 Interst. Com. Com. R. 158; *San Bernardino, etc., v. Atchison, etc., R. Co.*, 3 Interst. Com. R. 138; *Harwell v. Columbus, etc., R. Co.*, 1 Interst. Com. Com. R. 236; *Merchants' Union v. Northern Pac. R. Co.*, 4 Interst. Com. R. 183; *Perry v. Florida Cent. R. Co.*, 3 Interst. Com. R. 740.

<sup>3</sup> *In re Louisville, etc., R. Co.*, 1 Interst. Com. Com. R. 31, 57; *Interstate Com. Com. v. Alabama, etc., R. Co.*, 69 Fed. R. 227, affirmed in 74 Fed. R. 715; *Texas, etc., Co. v. Interstate Com. Com.*, 162 U. S. 197, s. c. 16 Sup. Ct. R. 666. But even a state carrier, by engaging in interstate commerce and becoming part of a continuous line, may come within the statute. *Cincinnati, etc., R. Co. v. Interstate Com. Com.*, 162 U. S. 184, s. c. 16 Sup. Ct. R. 700. See for other things that may cause dissimilarity in circumstances or conditions, *Detroit, etc., R. Co. v. Interstate Com. Com.*, 74 Fed. R. 803; *Interstate Com. Com. v. Louisville, etc., R. Co.*, 73 Fed. R. 409.

structive of legitimate competition.<sup>1</sup> But the view since taken is that, while such "rare and peculiar" cases will justify the commission in affording relief or permitting such charges, it is not a matter for the railroad companies to determine even in the first instance.<sup>2</sup> In a very recent case the United States Supreme Court stated the elements which should be considered by the commission and the rules by which it should be governed in determining questions arising under the third and fourth sections of the interstate commerce act, and held that ocean competition beyond the seaboard of the United States should be considered in determining whether a difference in rates between import and domestic traffic from the seaboard is not justified by reason of the dissimilar conditions and circumstances.<sup>3</sup> So, while a trade center can not demand, as matter of right, that the rates from a common source of supply shall be made up of the rate to itself and the rate thence to the smaller town,<sup>4</sup> and the arbitrary "basing point" system has been condemned,<sup>5</sup> yet it has been held that where the "basing point" was already a large distributing center and the competition by water and otherwise is great such a combination rate made by adding to the competitive through rate to such center the local rate from such center to a local station beyond is not in violation of the statute.<sup>6</sup> The interstate commerce act refers to compensation "in the aggregate" and does not prohibit a reasonable and proper local rate, less in the aggregate than the through rate, although greater in proportion per mile than the through rate. Many elements or influences may affect the one

<sup>1</sup> *Re Southern, etc., R. Co.*, 1 Interst. Com. R. 278.

<sup>2</sup> *Trammell v. Clyde, etc., Co.*, 4 Interst. Com. R. 120.

<sup>3</sup> *Texas, etc., R. Co. v. Interstate Com. Com.*, 162 U. S. 197, s. c. 16 Sup. Ct. R. 666. But compare *James v. East Tenn., etc., R. Co.*, 3 Interst. Com. Com. R. 225; *New York Produce Exch. v. New York Cent., etc., R. Co.*, 2 Interst. Com. R. 553.

<sup>4</sup> *Martin v. Chicago, etc., R. Co.*, 2 Interst. Com. Com. 25.

<sup>5</sup> *In re Tariffs, etc.*, 3 Interst. Com. Com. 19; *Hamilton v. Chattanooga, etc., R. Co.*, 3 Interst. Com. R. 482.

<sup>6</sup> *Interstate Com. Com. v. Alabama, etc., R. Co.*, 69 Fed. R. 227; affirmed in 74 Fed. R. 715. But see *Gerke, etc., Co. v. Louisville, etc., Co.*, 4 Interst. Com. R. 237, (lines converging from one point).

which have no bearing on the other, and the fact the local rate is greater in proportion than the through rate, or greater than the carrier's share of a joint rate, does not of itself make it illegal.<sup>1</sup> But it is not a sufficient justification for a greater charge in the aggregate for a shorter than for a longer haul over the same line in the same direction, the shorter being included in the longer distance, that the traffic for which the greater charge is made is local traffic, while the other is not; nor, unless in exceptional cases, that the short haul traffic is more expensive to the carrier; nor that the lesser charge for the longer haul has for its motive the encouragement of manufacturing, or the like, or the building up of business or trade centers; nor that it is merely the continuation of the favorable rates under which industrial establishments or trade centers have been built up.<sup>2</sup> It was held by one of the circuit courts that furnishing free cartage at one city and not at another upon the company's line at a less distance and through which the goods pass to reach the former place, where the rates are the same, is a violation of the long and short haul clause of the interstate commerce act,<sup>3</sup>

<sup>1</sup> *Parsons v. Chicago, etc., R. Co.*, 63 Fed. R. 903; *Chicago, etc., R. Co. v. Osborne*, 52 Fed. R. 912; *Tozer v. United States*, 52 Fed. R. 917; *Coxe v. Lehigh Valley R. Co.*, 3 Interst. R. 460; *Lippman v. Illinois Cent. R. Co.*, 2 Interst. Com. Com. R. 584; *McMorran v. Grand Trunk R. Co.*, 2 Interst. Com. R. 604; *Martin v. Chicago, etc., R. Co.*, 2 Interst. Com. Com. R. 25. But see *Cincinnati, etc., R. Co. v. Interstate Com. Com.*, 162 U. S. 184, s. c. 16 Sup. Ct. R. 700; *Eau Claire, etc., v. Chicago, etc., R. Co.*, 4 Interst. Com. R. 65. As to the meaning of the phrase "in the aggregate," see *Detroit, etc., R. Co. v. Interstate Com. Com.*, 74 Fed. R. 803, where it is given rather an unusual application if not construction. See, also, *Ragan v. Aiken*, 9 Lea (Tenn.) 609, s. c. 9 Am. & Eng. R. Cas. 201; *St. Louis, etc., R.*

*Co. v. Hill*, 14 Ill. App. 579; *Illinois Cent. R. Co. v. People*, 121 Ill. 304, s. c. 12 N. E. R. 670; *King v. New York, etc., R. Co.*, 4 Interst. Com. Com. R. 251.

<sup>2</sup> *Trammell v. Clyde, etc., Co.*, 4 Interst. Com. R. 120; *Re Southern, etc., Assn.*, 1 Interst. Com. R. 278. See also, *Chicago, etc., R. Co. v. People*, 67 Ill. 11; *Illinois Cent. R. Co. v. People*, 121 Ill. 304, s. c. 12 N. E. R. 670.

<sup>3</sup> *Interstate Com. Com. v. Detroit, etc., R. Co.*, 57 Fed. R. 1005, 4 Interst. Com. R. 722. See, also, *Stone v. Detroit, etc., R. Co.*, 3 Interst. Com. Com. R. 613. In *Junod v. Chicago, etc., R. Co.*, 47 Fed. R. 290, 3 Interst. Com. R. 663, it was held a violation of the law to forward grain from Nebraska through places in Iowa to Chicago at a less rate than charged from Chicago to

but this ruling has recently been reversed in an elaborate opinion by the circuit court of appeals.<sup>1</sup> It will be observed that the prohibition in this clause is directed against a greater compensation for a shorter than for a longer distance *over the same line*, in the same direction, and controversy has arisen as to the meaning and effect of the phrase "over the same line." It has been held in several cases that the joint use of the same track by different companies does not necessarily make it the same line within the meaning of this clause so as to compel either company to grade its tariff by that of the other,<sup>2</sup> and that where two companies owning connecting lines make a joint through tariff the two lines do not thereby become the "same line" within the meaning of the statute, and the joint through rate is not the standard by which the separate tariff of either is to be measured in determining its validity under the statute, for it may lawfully charge a greater local rate on its own line than its share of the joint rate for a longer haul.<sup>3</sup> But these cases are distinguished in a recent decision by the United State Supreme Court, in which it is held that "when goods are shipped under a through bill of lading from a point in one state to a point in another, and when such goods are received in transit

such points in Iowa. See, also, *Detroit Board, etc., v. Grand Trunk R. Co.*, 2 Interst. Com. R. 199. So, in *James v. East Tenn., etc., R. Co.*, 2 Interst. Com. R. 609, it was held that a difference in bulk and value of lumber did not justify a greater charge for shorter distance where the carriers in their rate sheets had put the lumber in the same class and at the same rate. For other instances in which it was held that the conditions and circumstances did not justify a less rate for a longer haul, or a greater charge for a shorter haul, see *Raworth v. Northern Pac. R. Co.*, 3 Interst. Com. R. 857; *Re Chicago, etc., R. Co.*, 2 Interst. Com. R. 137, (competition between two roads and unreasonably low rate between two points by competitor);

*Northwestern Ia., etc., Assn. v. Chicago, etc., R. Co.*, 2 Interst. Com. R. 431, (road consisting of main line and branch lines to same terminus); *James, etc., Co. v. Cincinnati, etc., Co.*, 3 Interst. Com. R. 682, (roads forming a continuous line).

<sup>1</sup> *Detroit, etc., Co. v. Interstate Com. Com.*, 74 Fed. R. 803.

<sup>2</sup> *Interstate Com. Com. v. Cincinnati, etc., R. Co.*, 4 Interst. Com. R. 332, 56 Fed. R. 925. But see the last two notes to this section.

<sup>3</sup> *Chicago, etc., R. Co. v. Osborne*, 52 Fed. R. 912, 4 Interst. Com. R. 257, 53 Am. & Eng. R. Cas. 18; *Parsons v. Chicago, etc., R. Co.*, 63 Fed. R. 903; *Tozer v. United States*, 52 Fed. R. 917; *United States v. Mellen*, 53 Fed. R. 229, 4 Interst. Com. R. 247.

by a state common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce;" and that it is "within the jurisdiction of the commission to consider whether the said company, in charging a higher rate for a shorter than for a longer distance over the same line, in the same direction, the greater being included within the longer distance, was or was not transporting property, in transit between states, under substantially similar circumstances and conditions."<sup>1</sup> It seems to have been assumed, however, rather than expressly decided, that the line formed by the several railroads was "the same line" within the meaning of the fourth section of the statute.<sup>2</sup>

§ 1683. **Group rates.**—It has been held that the making of a "group rate," although it resulted in charging the same for a short as for a long haul, was not illegal under a state statute providing that no unjust discrimination shall be made against any person or place and that "it shall be *prima facie* evidence of an unjust discrimination for any railroad company to demand or receive from one person, firm or company a greater compensation than from another for the transportation in this state of any freight of the same kind or class, in equal or

<sup>1</sup> *Cincinnati, etc., R. Co. v. Interstate Com. Com.*, 162 U. S. 184, s. c. 16 Sup. Ct. R. 700. See, also, as to when a railroad wholly within one state is subject to the interstate commerce act. *Augusta, etc., Co. v. Wrightsville, etc., Co.*, 74 Fed. R. 522; *Mattingly v. Pennsylvania Co.*, 3 Interst. Com. Com. R. 592, 609.

<sup>2</sup> The effect of the term "same line" in the fourth section of the act is not referred to in the opinion, but the decree of the circuit court of appeals, which was affirmed, upheld that portion of the order of the interstate commerce commission which required the carrier to desist from charging or

receiving any greater compensation, in the aggregate, "for the shorter distance over the line formed by their several railroads" from *Cincinnati to Social Circle*, "than they charge or receive for the transportation of said articles for the longer distance over the same line" from *Cincinnati to Augusta*. The circuit court held that the new line formed by the separate carriers was not "the same line." Its decision was reversed by the circuit court of appeals, whose judgment was affirmed by the supreme court. See *Interst. Com. Com. v. Cincinnati, etc., R. Co.*, 56 Fed. R. 925.

greater quantities, for the same or a less distance.”<sup>1</sup> So, it seems to be settled that grouping rates upon such products as coal, milk or similar commodities for which a large demand exists, so as to give all in a certain producing district or within a certain distance a uniform rate and place them upon an equality among themselves and with those in other districts who compete in the same market, is not necessarily a violation of section three of the interstate commerce law, prohibiting unjust discrimination nor of section four, making it unlawful, under certain circumstances, to charge more for a shorter than for a longer distance.<sup>2</sup> It must result in undue prejudice or injury in order to render it unlawful.<sup>3</sup> Thus, it has been held proper to make a group rate to a large number of mines, composing practically a single coal mining district, although some of the mines were many miles apart.<sup>4</sup> So, it has been held lawful to group stations, although from twenty-five to one hundred miles apart, and charge a common rate to each from some far distant point, the distance from such point to each being regarded as “practically the same in the large view of the subject;”<sup>5</sup> and a uniform rate upon milk shipped

<sup>1</sup> Texas, etc., R. Co. v. Kuteman, 54 Fed. R. 547, distinguishing Texas, etc., R. Co. v. Kuteman, 79 Tex. 465, s. c. 14 S. W. R. 693, in which it was held, among other things, that the provision against charging more for a less than a greater distance applies although the freight is not being transported between the same points.

<sup>2</sup> Howell v. New York, etc., R. Co., 2 Interst. Com. R. 162, 2 Interst. Com. Com. R. 272; Rend v. Chicago, etc., R. Co., 2 Interst. Com. R. 313, 2 Interst. Com. Com. R. 540; Coxe v. Lehigh Valley R. Co., 3 Interst. Com. R. 460, 4 Interst. Com. Com. R. 535. See, also, Rice v. Atchison, etc., R. Co., 3 Interst. Com. R. 263 (“blanket rate” on oil); *Re* Tariffs of Transcontinental Lines, 2 Interst. Com. R. 203; Ransome v. Eastern Counties R. Co., 4 C.

B. N. S. 135; Denaby Main Colliery Co. v. Manchester, etc., R. Co., L. R. 11 App. Cas. 97, s. c. 26 Am. & Eng. R. Cas. 293; Lloyd v. Northampton, etc., R. Co., 3 Nev. & Mac. 259.

<sup>3</sup> Imperial Coal Co. v. Pittsburgh, etc., R. Co., 2 Interst. Com. R. 436, 2 Interst. Com. Com. R. 618.

<sup>4</sup> Rend v. Chicago, etc., R. Co., 2 Interst. Com. R. 313, 2 Interst. Com. Com. R. 540. But see Denaby Main Colliery Co. v. Manchester, etc., R. Co., 3 Nev. & Mac. 426.

<sup>5</sup> See Interst. Com. Com. v. Detroit, etc., R. Co., 57 Fed. R. 1005, 1010, 1015, 1018. See, also, Cincinnati, etc., R. Co. v. Interst. Com. Com., 162 U. S. 184, s. c. 16 Sup. Ct. R. 700. Judge Taft also held in the first case that such a grouping of stations was a conclusive admission that the transporta-

to New York City from all stations within two hundred miles upon railroads running west of the Hudson River to Jersey City has been held not to constitute unjust discrimination.<sup>1</sup> It is said by the United States Supreme Court, in a recent case, that the question as to what constitutes an undue preference or advantage, under the third section of the interstate commerce act, is one of fact, and that, in considering questions of discrimination between localities or questions arising under the fourth section, relating to long and short hauls, the welfare of the locality to which the goods are sent must be taken into account as well as the welfare of the locality where the traffic originates, or where the goods are placed on the cars.<sup>2</sup>

§ 1684. **Reasonable charges.**—The provision of the act requiring charges to be “reasonable and just” does nothing more than give expression to the rule of the common law, for that rule, as we have seen, prohibited common carriers from making unjust and unreasonable charges. We suppose that whether charges are or are not reasonable must be determined, in particular cases, from the facts, circumstances and conditions, since many elements must be considered in order to justly determine whether rates are reasonable or unreasonable.<sup>3</sup> It is now well settled that railroad companies can not be re-

tion from the point from which the group rate was made to the warehouse of the company at each of such stations was under substantially similar circumstances and conditions; but Judge Severns dissented as to this proposition, and the latter’s view was taken by the court of appeals. *Detroit, etc., R. Co. v. Interst. Com. Com.*, 74 Fed. R. 803.

<sup>1</sup> *Howell v. New York, etc., R. Co.*, 2 Interst. Com. R. 162, 2 Interst. Com. Com. R. 272.

<sup>2</sup> *Texas, etc., R. Co. v. Interst. Com. Com.*, 162 U. S. 197, s. c. Sup. Ct. R. 666. And so must the welfare of the carrier. *Interst. Com. Com. v. Alabama, etc., R. Co.*, 74 Fed. R. 715.

<sup>3</sup> *Severn, etc., R. Co. v. Great Western, etc., R. Co.*, 5 Ry. & Canal Tr. Cas. 170; *Business Men’s Asso. v. Chicago, etc., R. Co.*, 2 Interst. Com. Com. R. 52; *Rice v. Cincinnati, etc., R. Co.*, 5 Interst. Com. Com. R. 193; *Rice v. Louisville, etc., R. Co.*, 5 Interst. Com. R. 193; *Loud v. South Carolina R. Co.*, 5 Interst. Com. Com. R. 529; *Perry v. Florida, etc., R. Co.*, 5 Interst. Com. Com. R. 97; *Boston, etc., v. Lake Shore, etc., Co.*, 1 Interst. Com. Com. R. 436; *Railroad Commissioners v. Savannah, etc., R. Co.*, 5 Interst. Com. Com. R. 13, 136; *Interst. Com. Com. v. Lehigh, etc., R. Co.*, 74 Fed. R. 784.



quired to render service as carriers without just compensation, so that it must necessarily follow that the cost of the service is always an important matter for consideration, and so are many other matters. We can not give in detail the facts, circumstances or conditions that should be taken into consideration and must content ourselves with a reference to the decided cases.<sup>1</sup> "Reasonable" and "just rates" have been held to be such as are just and reasonable on the particular railroad, and in view of the surrounding circumstances.<sup>2</sup> Upon a similar line of reasoning it has been held that the mere fact that the rates are such as make the business of the carrier very profitable is not proof that the rates are unreasonable.<sup>3</sup> It has been held that the fact that charges are not unreasonable *per se* does not prevent their being relatively unreasonable or constituting unjust discrimination by reason of being unequal,<sup>4</sup> but we sup-

<sup>1</sup> Board, etc., *v.* East Tennessee, etc., R. Co., 5 Interst. Com. Com. R. 546; Murphy *v.* Wabash, etc., R. Co., 5 Interst. Com. Com. R. 122; Detroit, etc., Co. *v.* Grand Trunk, etc., R. Co., 2 Interst. Com. R. 199; Lincoln, etc., *v.* Missouri, etc., R. Co., 2 Interst. Com. R. 98; Evans *v.* Oregon, etc., R. Co., 1 Interst. Com. C. R. 325; Severn *v.* Great Western, etc., R. Co., 4 Ry. & C. T. Cas. 170; Merchants' Union *v.* Northern, etc., R. Co., 5 Interst. Com. Com. R. 478; Delaware State Grange *v.* New York, etc., R. Co., 5 Interst. Com. Com. R. 161; James *v.* Canadian, etc., R. Co., 5 Interst. Com. Com. R. 612; Board *v.* East Tennessee, etc., R. Co., 5 Interst. Com. Com. R. 546; Interst. Com. *v.* Alabama, etc., R. Co., 74 Fed. R. 715. In the case last cited the prevailing doctrine was thus stated: "We do not discuss the third and fourth contention of the counsel further than to say that, within the limits of the exercise of intelligent good faith in the conduct of their business, and subject to the two leading propositions that their charges shall not be unjust or unreasonable and that they shall

not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers, as they were at common law, free to make special rates looking to the increase of their business, to classify their traffic, to apportion and adjust their rates so as to meet the necessities of commerce and of their own situation and relation to it and generally to manage their important interests upon the same principles which are regarded as sound and adapted to other trades and pursuits."

<sup>2</sup> New Orleans, etc., Exchange *v.* Illinois Central R. Co., 3 Interst. Com. C. R. 534.

<sup>3</sup> Howell *v.* New York, etc., R. Co., 2 Interst. Com. C. 272. See as to what is *prima facie* evidence of reasonableness, *In re* Tariffs, etc., 2 Interst. Com. C. R. 324; Detroit, etc., R. Co. *v.* Interst. Com. Com., 74 Fed. R. 803; Ottinger *v.* Southern, etc., R. Co., 1 Interst. Com. C. R. 144.

<sup>4</sup> Trammell *v.* Clyde, etc., Co., 5 Int. Com. Com. R. 324, 376, citing

pose that where the charges are not unreasonable *per se* it would devolve upon the complainant in the particular case to give evidence of circumstances and conditions clearly showing the charges to be unreasonable.

§ 1685. **Interchange of business.**—It is difficult to lay down any definite rule as to the rights of railroad companies in cases where there is an interchange of business. The provisions of the interstate commerce act<sup>1</sup> have been held not to prevent a railroad company from requiring a company tendering it freight to break bulk and transfer the freight to the cars of the company to which the freight is tendered.<sup>2</sup> It is, perhaps, safe to say that, subject to the prohibitions against unjust or unreasonable charges and against unjust discrimination, railroad companies are free to make contracts respecting the interchange of freight.<sup>3</sup> We also think that the authorities require the conclusion that while a railroad company can not unjustly discriminate against another company, yet it may make reasonable rules and regulations respecting the interchange of freight,

and distinguishing *Hozier v. Caledonian, etc., R. Co.*, 1 Nev. & Mac. 27; *Jones v. Eastern Counties, etc., R. Co.*, 1 Nev. & Mac. 45; *Painter v. London, etc., R. Co.*, 2 C. B. (N. S.) 702. In *Interst. Com. Com. v. Baltimore, etc., R. Co.*, 145 U. S. 263, the English statutes and cases were reviewed and it was said: "These traffic acts do not appear to be as comprehensive as our own and may justify contracts which with us would be obnoxious to the long and short-haul clause of the act or would be open to the charge of unjust discrimination." See, generally, *Budd v. London, etc., R. & Canal Traf. Cas.* 393, *n.*; *Murray v. Glasgow, etc., R. Co.*, 4 R. & Canal Traf. Cas. 456; *Strick v. Swasea, etc., Co.*, 16 C. B. N. S. 245; *Liverpool, etc., Asso. v. London, etc., Co.*, L. R. (1891) 1 Q. B. 120, *s. c.* 45 Am. & Eng. R. Cas. 216;

*Hays v. Pennsylvania Co.*, 12 Fed. R. 309; *Attorney General v. Birmingham, etc., R. Co.*, 2 Eng. R. & Canal Cas. 124.

<sup>1</sup> Interstate Com. Act, § 3.

<sup>2</sup> *Ante*, § 1395.

<sup>3</sup> *Cincinnati, etc., R. Co. v. Interstate Com. Com.*, 162 U. S. 184, *s. c.* 16 Sup. Ct. R. 700; *Interstate Com. Com. v. Baltimore, etc., R. Co.*, 43 Fed. R. 37, 145 U. S. 263, 12 Sup. Ct. R. 844. See *State v. Sioux City, etc., R. Co.*, 46 Neb. 682, *s. c.* 31 L. R. A. 47, 53; *Paxton v. Farmers', etc., Co.*, 45 Neb. 884, *s. c.* 29 L. R. A. 853; *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 667; *Pullman, etc., Co. v. Missouri, etc., R. Co.*, 115 U. S. 587; *Re Joint Water and Rail Lines*, 2 Interst. Com. R. 486; *Rice v. Cincinnati, etc., R. Co.*, 3 Interst. Com. R. 841.

and is not under a duty to surrender its station buildings or the like to the use of another company.<sup>1</sup> We are not, however, to be understood as affirming that a railroad company may refuse to interchange freight or that it can make unjust discriminations, but we do think that the right to use its own property for its own legitimate purposes is not abridged to any greater extent than is necessary to prevent unjust discrimination and secure the free and fair interchange of freight.<sup>2</sup> It is held that the provision of the act respecting the interchange of business does not require one company to yield its terminal facilities to another.<sup>3</sup>

§ 1686. **Joint tariffs—Through rates.**—The trend of the cases, as we have elsewhere shown, is against undue or unnecessary restrictions upon the rights of contract and of property, and, in accordance with that general doctrine, it is held that a railroad carrier can not be compelled to yield control of its road or make local rates to suit another carrier.<sup>4</sup> But where a railroad company becomes part of a continuous line, “under a common control, management or arrangement for a continuous carriage,” it can not limit the control of the commission, “in respect to foreign traffic, to certain points on its road and to exclude other points.”<sup>5</sup> Where there is a continuous line,

<sup>1</sup> *Ilwaco, etc., Co. v. Oregon, etc., R. Co.*, 57 Fed. R. 673; authorities cited in preceding note to this section.

<sup>2</sup> *St. Louis, etc., R. Co. v. Southern Express Co.*, (Express Cases) 117 U. S. 1; *Little Rock, etc., R. Co. v. St. Louis, etc., R. Co.*, 41 Fed. R. 559; *Kentucky, etc., Co. v. Louisville, etc., Co.*, 37 Fed. R. 567.

<sup>3</sup> *Little Rock, etc., Co. v. St. Louis, etc., R. Co.*, 59 Fed. R. 400; *Ilwaco, etc., Co. v. Oregon, etc., R. Co.*, 57 Fed. R. 673. But see *New York, etc., R. Co. v. New York, etc., R. Co.*, 50 Fed. R. 867.

<sup>4</sup> *Cincinnati, etc., R. Co. v. Interst. Com. Com.*, 162 U. S. 184, s. c. 16 Sup. Ct. R. 700; *Chicago, etc., R. Co. v. Osborne*, 52 Fed. R. 912; *Kentucky,*

*etc., Co. v. Louisville, etc., R. Co.*, 37 Fed. R. 567, 2 L. R. A. 289; *Little Rock, etc., R. Co. v. East Tennessee, etc., R. Co.*, 2 Interst. Com. R. 454; *Capehart v. Louisville, etc., R. Co.*, 3 Interst. Com. R. 278; *Interst. Com. Com. v. Baltimore, etc., R. Co.*, 145 U. S. 263, 12 Sup. Ct. R. 844, 43 Fed. R. 37.

<sup>5</sup> *Cincinnati, etc., R. Co. v. Interst. Com. Com.*, 162 U. S. 184, s. c. 16 Sup. Ct. R. 700. See *Boston, etc., Exch. v. New York, etc., R. Co.*, 3 Interst. Com. R. 493, 604; *Mattingly v. Pennsylvania Co.*, 2 Interst. Com. R. 806; *Tranmell v. Clyde, etc., Co.*, 4 Interst. Com. R. 120; *Re Atlanta, etc., R. Co.*, 2 Interst. Com. R. 461; *Hamilton v. Chattanooga, etc., R. Co.*, 3 Interst. Com. R. 482.

although composed of the roads of two or more companies, the through rates must be reasonable.<sup>1</sup> It has been held that railroad companies can not, by breaking a haul in two and assuming to be separate or independent carriers, evade the provisions of the act.<sup>2</sup> Joint tariffs and joint through rates are held to be matters of contract, express or implied, between the different companies.<sup>3</sup> Rate sheets or schedules must be printed and posted, as the act requires, and must be adhered to by the carriers.<sup>4</sup>

<sup>1</sup> *Brady v. Pennsylvania Co.*, 2 Interst. Com. R. 78; *James, etc., Co. v. Cincinnati, etc.*, R. Co., 3 Interst. Com. R. 682; *Tranmell v. Clyde, etc., Co.*, 4 Interst. Com. R. 120, 139; *Chamber of Commerce v. Flint, etc.*, R. Co., 2 Interst. Com. C. R. 553; *In re Passenger Tariffs*, 2 Interst. Com. C. R. 649. See, generally, *In re Clark*, 3 Interst. Com. C. R. 649. See, also, *Central, etc., R. Co. v. Great Western, etc.*, R. Co., 4 R. & Canal Traf. Cas. 110; *Greenock, etc., R. Co. v. Caledonian R. Co.*, 3 Nev. & Mac. 145; *East, etc., R. Co. v. Great Western, etc.*, R. Co., 1 Nev. & Mac. 331; *Hammans v. Great Western, etc.*, R. Co., 4 R. & Canal Traf. 181; *Warwick, etc., Co. v. Birmingham, etc.*, Co., 5 L. R. Exch. Div. 1.

<sup>2</sup> *Brady v. Pennsylvania R. Co.*, 2 Interst. Com. C. R. 131; *Brady v. Pennsylvania R. Co.*, 2 Interst. Com. R. 78; *Board, etc., v. Alabama, etc.*, R. Co., 4 Interst. Com. R. 348; *In re Grand Trunk R. Co.*, 2 Interst. Com. R. 496.

<sup>3</sup> *Kentucky, etc., Co. v. Louisville, etc.*, R. Co., 37 Fed. R. 567, s. c. 2 L. R. A. 289; *Cincinnati, etc., R. Co. v. Interst. Com. Com.*, 162 U. S. 184, s. c. 16 Sup. Ct. R. 700; *Chicago, etc., R. Co. v. Osborne*, 52 Fed. R. 912; *Duncan v. Atchison, etc.*, R. Co., 4 Interst. Com. R. 385. See *Gulf, etc., R. Co. v. Nelson*, 5 Texas Civ. App. 387. See, generally, upon the subject of through rates. *La Crosse, etc., Co.*

*v. Chicago, etc., Co.*, 2 Interst. Com. R. 9; *Business Men, etc., Assn. v. Chicago, etc., R. Co.*, 2 Interst. Com. R. 41; *Lippman v. Illinois Central R. Co.*, 2 Interst. Com. R. 414; *Board v. Alabama, etc., R. Co.*, 4 Interst. Com. R. 348; *Perry v. Florida, etc., Co.*, 3 Interst. Com. R. 740; *Lehmann v. Texas, etc., R. Co.*, 2 Interst. Com. R. 548; *Tomlinson v. London, etc., R. Co.*, 8 Ry. & Corp. L. J. 328.

<sup>4</sup> *San Bernardino, etc., v. Atchison, etc.*, R. Co., 3 Interst. Com. R. 138; *Re Rate Sheets*, 1 Interst. Com. 316; *In re Grand Trunk, etc.*, R. Co., 2 Interst. Com. R. 496; *Phelps v. Texas, etc.*, R. Co., 4 Interst. Com. R. 363; *Lehmann v. Texas, etc.*, R. Co., 3 Interst. Com. R. 706; *Coupland v. Housatonic, etc.*, R. Co., 61 Conn. 531; *Re Filing Copies, etc.*, 1 Interst. Com. R. 76; *In re Grand Trunk, etc.*, R. Co., 2 Interst. Com. R. 496; *Re Passenger Tariff*, 2 Interst. Com. R. 445; *Town of East Hartford v. American, etc., Bank*, 49 Conn. 539; *Upton v. Tribilcock*, 91 U. S. 45. For English decisions upon subject of "Rate books," see *Cairns v. North Eastern R. Co.*, 4 R. & Canal Traf. Cas. 221; *Walkinson v. Wrexham, etc.*, R. Co., 3 Nev. & Mac. 446; *Clonmel Traders v. Waterford, etc.*, R. Co., 4 R. & Canal Traf. Cas. 92. See, generally, *Myrick v. Michigan, etc.*, R. Co., 107 U. S. 102, 108; *Stewart v. Terre Haute, etc.*, R. Co., 3 Fed. R. 768.

Advances and reductions in rates must be made in accordance with the provisions of the act.<sup>1</sup>

**§ 1687. Party rates, mileage and commutation tickets.**—The rule that discrimination may be made where the circumstances are substantially dissimilar is recognized by many express provisions of the act. Thus, “party rates” may be made and commutation tickets issued.<sup>2</sup> While mileage tickets may be issued, unjust discrimination is forbidden and such tickets must be issued to all persons alike when properly requested and the conditions and circumstances are substantially similar.<sup>3</sup>

**§ 1688. Violations of the interstate commerce act—Indictments.**—It will aid us in securing a clear view of the construction given the interstate commerce act to consider some of the decisions rendered in cases where violators of the act were prosecuted by indictment, and at the same time will assist us in reaching a correct conclusion upon the question of what facts an indictment must contain in order to make it good. In one of the cases an indictment professing to charge the defendant with unlawfully receiving less compensation from one shipper than from another which alleged that a rebate was given a designated shipper, but did not allege any instance in which a rebate was denied to another shipper, was held bad.<sup>4</sup>

<sup>1</sup> See *MacFarlane v. North British*, etc., R. Co., 4 R. & Canal Traf. Cas. 269.

<sup>2</sup> Act to regulate commerce, § 22; *Interst. Com. Com. v. Baltimore*, etc., R. Co., 145 U. S. 263, s. c. 12 Sup. Ct. R. 844; *In re Jones & Eastern R. Co.*, 3 C. B. (N. S.) 718; *Oxlake v. North-eastern R. Co.*, 1 C. B. (N. S.) 454.

<sup>3</sup> *Associated, etc., Grocers', etc., v. Missouri Pac. R. Co.*, 1 *Interst. Com. Com. R.* 156; *Larrison v. Chicago*, etc., R. Co., 1 *Interst. Com. Com. R.* 147. For a definition of commutation and mileage tickets, see *Harper's Interstate Commerce Act*, 188-192. As to the

power of the Interstate Commerce Commission respecting the exceptions, see *Thatcher v. Fitchburg R. Co.*, 1 *Interst. Com. R.* 356; *Re Theatrical Rates*, 1 *Interst. Com. R.* 18. As to when carriers may be authorized to make special rates, see *Philadelphia, etc., Co. v. Pennsylvania*, 122 U. S. 326; *Savery v. New York*, etc., R. Co., 2 *Interst. Com. R.* 210; *Re Indian Supplies*, 1 *Interst. Com. R.* 22; *Smith v. Northern Pac. R. Co.*, 1 *Interst. Com. R.* 611; *In re Religious Teachers*, 1 *Interst. Com. R.* 21; *Sanger v. Southern*, etc., R. Co., 2 *Interst. Com. R.* 548.

<sup>4</sup> *United States v. Hanley*, 71 Fed. R.

A conspiracy to obstruct or impede interstate commerce is an indictable offense, and subjects the offender to punishment.<sup>1</sup> It is held that signing a "line voucher" in the third federal circuit payable at a place in the eighth circuit even if a violation of the interstate commerce act is not cognizable in the courts of the former circuit.<sup>2</sup> It is held that it is not necessary in a prosecution for conspiring to violate the act regulating commerce to prove that schedules of rates were posted for the reasons that schedules are required to be posted for the information of the public and an established rate may be proved in other modes than by showing that schedules were posted.<sup>3</sup> So,

672. In the case referred to the court said: "The language of the statute recognizes that a uniform rate between different shippers is not always possible or proper; that the time of service, the kind of traffic, and the circumstances and conditions under which it is transported may materially change the just obligations and duties of the carrier to his patrons. Equality and uniformity of rate dissociated from considerations of the time, kind and circumstances of the transaction is, therefore, not the object aimed at. The object of the statute is to prevent one shipper from getting the advantage over his competitor in the matter of rates only when they both make substantially a like offering to the carrier."

<sup>1</sup>Thomas v. Cincinnati, etc., R. Co., 62 Fed. R. 803; *In re Phelan*, 62 Fed. R. 803; *In re Grand Jury*, 62 Fed. R. 834; *United States v. Elliott*, 62 Fed. R. 801. See, generally, *Toledo, etc., R. Co. v. Pennsylvania, etc., R. Co.*, 54 Fed. R. 730, 738; *In re Debs*, 158 U. S. 564, s. c. 15 Sup. Ct. R. 900. The case last cited contains an exhaustive review of the authorities and affirms the power of the federal courts to prevent the obstruction of interstate commerce. The following cases

were cited: *Lane County v. Oregon*, 7 Wall. 71, 76; *Fong Yue Ting v. United States*, 149 U. S. 698, s. c. 13 Sup. Ct. R. 1010. See, also, upon the question of conspiracy *State v. Glidden*, 55 Conn. 46, s. c. 8 Atl. R. 890; *State v. Stewart*, 59 Vt. 273, s. c. 9 Atl. R. 559; *Bowen v. Hall*, 6 Q. B. Div. 333; *Old, etc., Steamship Co. v. McKenna*, 30 Fed. R. 48; *Casey v. Cincinnati Typographical Union*, 45 Fed. R. 135; *United States v. Workmen's, etc., Asso.*, 54 Fed. R. 994; *Temperton v. Russell*, L. R. (1893) 1 Q. B. 715; *Carew v. Rutherford*, 106 Mass. 1; *Angle v. Chicago, etc., Ry. Co.*, 151 U. S. 1, s. c. 14 Sup. Ct. R. 240. As to the remedy by injunction, see *Sherry v. Perkins*, 147 Mass. 212; *Coeur D'Alene Co. v. Miners' Union*, 51 Fed. R. 260; *Blindell v. Hagan*, 54 Fed. R. 40; *Farmers', etc., Co. v. Northern, etc., R. Co.*, 60 Fed. R. 803.

<sup>2</sup>*United States v. Fowkes*, 53 Fed. R. 13, distinguishing *In re Palliser*, 136 U. S. 257, s. c. 10 Sup. Ct. R. 1034; *Horner v. United States*, 143 U. S. 207, s. c. 12 Sup. Ct. R. 407.

<sup>3</sup>*United States v. Howell*, 56 Fed. 21. In *Tozer v. United States*, 52 Fed. 917, it is held that there can be no conviction under the provisions of the act prohibiting "undue prefer-

it has been held that an agent who simply collects freight charges, and has nothing to do with fixing rates, is not indictable under the long and short haul clause of the interstate commerce act.<sup>1</sup> Other cases involving the construction of the interstate commerce act are cited in the last note.

ences," in a case where the jury are required to determine whether the preference was reasonable or unreasonable, but this doctrine seems to be opposed to that asserted in other cases.

<sup>1</sup> *United States v. Mellen*, 53 Fed. R. 229. See, generally, *United States v. Mellen*, 4 Interst. Com. R. 247, s. c. 53 Fed. R. 229; *United States v. Egan*, 47

Fed. R. 112, 3 Interst. Com. R. 582; *United States v. Morsman*, 42 Fed. R. 448; *Junod v. Chicago, etc., R. Co.*, 47 Fed. R. 290; *United States v. Knight*, 3 Interst. Com. R. 801; *United States v. Cleveland, etc., R. Co.*, 3 Interst. Com. R. 290; *Regina v. Bradford, etc., Co.*, 6 Best & L. 631; *United States v. Michigan, etc., R. Co.*, 43 Fed. R. 26.

## CHAPTER LXXII.

### ACTIONS AGAINST RAILROAD COMPANIES.

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|-----------------------------------------------------------------------|------------------------------------------------------|
| § 1689. Generally—Scope of chapter.                                   | 1696. Actions for injuries to passengers.            |
| 1690. Remedy for breach of duty as public or common carrier—Mandamus. | 1697. Actions for injuries to employes.              |
| 1691. Remedy for refusal to carry—Action for damages.                 | 1698. Pleading ordinances.                           |
| 1692. Actions against common carriers—Parties.                        | 1699. Inspection and physical examination of party.  |
| 1693. Actions against common carriers—Form of action.                 | 1700. Experiments and practical tests—Real evidence. |
| 1694. Actions against common carriers—Pleading.                       | 1701. Presumptions.                                  |
| 1695. Actions against common carriers—Evidence.                       | 1702. Withdrawing the case from the jury.            |
|                                                                       | 1703. Physical facts.                                |

§ 1689. **Generally—Scope of chapter.**—In this chapter we propose to consider some matters of pleading, practice and procedure generally that we have found to be of use and importance in railroad litigation. This is a treatise upon substantive law rather than upon procedure, and we shall not undertake to treat of pleading, practice or evidence, nor of the measure of damages, at any length. There is little in the law upon these subjects that is peculiarly applicable to railroads, and to treat them fully would require several volumes. The general subject of actions by and against corporations has already been treated,<sup>1</sup> and the manner of enforcing particular rights and remedying particular wrongs has generally been pointed out in connection with the discussion of the substantive law governing such cases. We shall here consider merely such additional matters of pleading, practice and procedure as most frequently arise and are of practical use and importance in railroad litigation.

<sup>1</sup> *Ante*, chapter xxv.  
(2690)



§ 1690. Remedy for breach of duty as a public or common carrier—Mandamus.—The public nature of the duty of a railroad company to transport goods or passengers is one of which performance may in some instances be coerced by mandamus.<sup>1</sup> The duty to carry is a duty owing primarily to the public,<sup>2</sup> but there is a particular or specific right in every member of the public who makes a proper tender of goods or properly offers himself as a passenger, to enforce a performance of that duty. A violation of the duty may, of course, give to the person who properly demands its performance a private right of action, but because there may be a private right of action it does not necessarily follow that mandamus may not in some instances be an appropriate remedy. It is true that mandamus is an extraordinary remedy and can not be resorted to where an ordinary remedy will afford complete relief, but a private action for damages by a person who properly demands transportation for goods or passengers may not always afford adequate relief, and hence there are instances in which an individual may successfully invoke the extraordinary remedy. We do not mean to be understood as asserting that where there is simply a question affecting the private right of the parties in the particular case mandamus will lie, as, for instance, where the refusal to carry is placed solely upon the ground that the offer or tender of goods was not made as the reasonable regulations of the company require; on the contrary, our opinion is that mandamus will not lie unless there is some element of a public nature, as, for instance, where there is favoritism or unjust discrimination, or some such violation of a public duty. We believe, however, that mandamus is an appropriate remedy where there is a general and continuous refusal to carry, but we do not believe, as we have indicated, that where the refusal to

<sup>1</sup> State v. Delaware, etc., R. Co., 48 N. J. Law 55; Chicago, etc., R. Co. v. People, 56 Ill. 365; Chicago, etc., R. Co. v. Burlington R. Co., 34 Fed. R. 481; People v. New York, etc., R. Co., 28 Hun (N. Y.) 543, s. c. 9 Am. & Eng. Cas. 1. But see People v. New York, etc., R. Co., 22 Hun 533; *Ex parte* Robins, 3 Jur. 103; People v. Babcock, 16 Hun 313.

<sup>2</sup> The company is, as to such a duty, in a restricted sense, a public agent. Messenger v. Pennsylvania R. Co., 36 N. J. L. 407, s. c. 13 Am. R. 457.

carry is based upon reasons peculiar to the particular case, and only incidentally involves matters concerning the public duty, that mandamus will lie.<sup>1</sup> Some of the cases seem to hold that mandamus will not lie except where the duty is created by statute, but in our opinion mandamus will lie where there is a specific duty created by law whether the law be embodied in a statute or not.<sup>2</sup>

§ 1691. **Remedy for refusal to carry—Action for damages.**—An action for damages is the ordinary remedy for a wrongful refusal to carry,<sup>3</sup> but, as we have seen, mandamus to compel the performance of the duty, will lie in some instances.<sup>4</sup> It has been held that the right of action for a mere refusal to carry does not accrue to the consignee.<sup>5</sup> A wrongful refusal by the railroad company will not justify the shipper in abandoning the property or in leaving it exposed to the ravages of the weather at the carrier's expense. It would still be the shipper's duty to preserve the property, and it would be his right

<sup>1</sup> We think the principles declared in such cases as *Central, etc., Co. v. State*, 123 Ind. 113; *Central, etc., Co. v. State*, 118 Ind. 194; *State v. Nebraska, etc., Co.*, 17 Neb. 126; *Vincent v. Chicago, etc., R. Co.*, 49 Ill. 33; *People v. Manhattan, etc., Co.*, 45 Barb. 136, govern cases of the class referred to in the text. Analogous cases may also be cited, as, *Mobile, etc., R. Co. v. Wisdom*, 5 Heisk. 125; *Haugen v. Albina, etc., Co.*, 21 Ore. 411, s. c. 28 Pac. R. 244; *Price v. Riverside, etc., Co.*, 56 Cal. 431; *People v. Rome, etc., R. Co.*, 103 N. Y. 95; *People v. Albany, etc., R. Co.*, 24 N. Y. 261.

<sup>2</sup> *Price v. Riverside, etc., Co.*, 56 Cal. 431; *Mobile, etc., R. Co. v. Wisdom*, 5 Heisk. 125; *Durham v. Monumental, etc., Co.*, 9 Ore. 41; *People v. Green*, 64 N. Y. 499; *Biggs v. McBride*, 17 Ore. 640. See, also, note to

*Ex parte Koehler*, 29 Am. & Eng. R. Cas. 44, 53, and *ante*, §§ 637-643.

<sup>3</sup> *Fish v. Chapman*, 2 Ga. 349; *Doty v. Strong*, 1 Pinney (Wis.) 313, s. c. 40 Am. Dec. 773; *Nugent v. Smith*, L. R. 1 C. P. Div. 19, 423; *People v. New York, etc., R. Co.*, 22 Hun (N. Y.) 533; *Piedmont Mfg. Co. v. Columbia, etc., Railroad*, 19 S. Car. 353; *New Jersey S. N. Co. v. Merchants' Bank*, 6 How. (U. S.) 344. It has been held that the action may be brought in the county where refusal occurred. *Chase v. South P. C. R. Co.*, 83 Cal. 468, 42 Am. & Eng. R. Cas. 424.

<sup>4</sup> *Chicago Ry. Co. v. Burlington Ry. Co.*, 34 Fed. R. 481; *ante*, § 1690.

<sup>5</sup> *Lafaye v. Harris*, 13 La. Ann. 553. The action should be brought by the party who offers the goods for shipment and is injured by the refusal. *Cobb v. Iowa Cent. R. Co.*, 38 Iowa 601; *Pittsburgh, etc., R. Co. v. Racer*, 5 Ind. App. 209, s. c. 31 N. E. R. 855.

to recover the reasonable expense therefor from the carrier, together with the damages proximately caused by its breach of duty in refusing to carry.<sup>1</sup> It has been held that in an action for damages for the continual withholding of facilities, it is not necessary to state the points to which the goods were to be carried and to allege a tender of the freight.<sup>2</sup> But there is no duty resting upon a railroad company to have cars standing at all times at all of its stations, ready to receive freight, and a reasonable notice or demand in advance of the time of the proposed shipment, as well as a tender of the goods for transportation, must usually be shown as a condition precedent to a right of recovery.<sup>3</sup> As we have elsewhere seen, an unusual and extraordinary press of business may justify a carrier in

<sup>1</sup> *St. Louis, A. & T. R. Co. v. Neel*, 56 Ark. 279, s. c. 19 S. W. R. 963, 55 Am. & Eng. R. Cas. 428; *Houston, etc., Co. v. Smith*, 63 Texas 322; *Hutchinson on Carriers*, (2d ed.) § 774. The shipper can not, at his leisure, send the refused goods forward in parcels, and hold the carrier liable for the difference in freight. *Ward's Cen. & Pac. L. Co. v. Elkins*, 34 Mich. 439. Special damages should be particularly averred. *Roberts v. Graham*, 6 Wall. (U. S.) 578; *Vanderslice v. Newton*, 4 N. Y. 130; 1 *Sutherland on Damages*, § 419; *City of Chicago v. O'Brennan*, 65 Ill. 160. If there are other carriers it may also be the duty of the shipper to ship by them, and the difference in the cost of transportation may be the measure of the damages. *Grund v. Pendergast*, 58 Barb. (N. Y.) 216; *Crouch v. Great Northern R. Co.*, 11 Exch. 742; 3 *Suth. on Dam.*, § 899.

<sup>2</sup> *Central & M. R. Co. v. Morris*, 68 Texas, 49, 3 S. W. R. 457, 28 Am. & Eng. R. Cas. 50. A readiness to pay has been held to be as good an averment as a tender. *Pickford v. Grand Junction Railway*, 8 M. & W. 372. It

would be safer, however, to aver payment or a tender of freight, and there must at least be ability and readiness to pay. *Wyld v. Pickford*, 8 M. & W. 443; *Batson v. Donovan*, 4 B. & Ald. 21; *Knight v. Providence, etc., R. Co.*, 13 R. I. 572, s. c. 9 Am. & Eng. R. Cas. 90; 1 *Greenl. on Ev.*, § 210, note 6; *Galena, etc., R. Co. v. Rae*, 18 Ill. 488. But, as the measure of the damages usually depends upon the value of the goods at the place of shipment it would seem material to name that point. *Michigan, etc., R. Co. v. Caster*, 13 Ind. 164; *Sedgwick on Damages*, § 844. So it would seem material in order to show a breach of duty, for it might not be on the line of the road or the like.

<sup>3</sup> *Ayres v. Chicago, etc., R. Co.*, 71 Wis. 372, s. c. 37 N. W. R. 432; *Richardson v. Chicago, etc., R. Co.*, 61 Wis. 596; *Huston v. Wabash R. Co.*, 2 Mo. App. R. 941. See, also, *Louisville, etc., R. Co. v. Flanagan*, 113 Ind. 488; *Louisville, etc., R. Co. v. Godman*, 104 Ind. 490; *Pittsburgh, etc., R. Co. v. Morton*, 61 Ind. 539, 576; *Corso v. New Orleans, etc., R. Co.*, (La.) 20 So. R. 752.

failing or refusing to furnish cars and carry freight of a particular shipper at the time it is offered, when to do so would jeopardize its other business and prevent it from fulfilling its duties as to prior shipments, and so may extraordinary floods or the like, which render it impossible to carry the goods at the time; but it has been held that, if the carrier is unable to furnish cars at the time and in the numbers required without undue interference with its other business, it is a matter of defense and must be shown by the carrier.<sup>1</sup>

§ 1692. **Actions against common carriers—Parties.**—As a general rule, it is presumed, in the absence of any special contract, that a carrier is employed by the person at whose risk the goods are carried, that is, the owner or person who would suffer, if they were lost or injured.<sup>2</sup> It will be presumed, in the absence of anything to the contrary, that the consignee is the owner of goods shipped over a railroad, and the real party in interest, and, for this reason, he is usually the proper plaintiff, in an action to recover for their loss, injury or delay.<sup>3</sup>

<sup>1</sup> *Chicago, etc., R. Co. v. Wolcott*, 141 Ind. 267, s. c. 39 N. E. R. 451.

<sup>2</sup> *Dacey on Parties to Actions*, 87; 3 *Wood on Railroads*, 1936; *Mobile, etc., R. Co. v. Williams*, 54 Ala. 168. See, also, *Law v. Hatcher*, 4 Blkf. (Ind.) 364; *Congar v. Galena, etc., R. Co.*, 17 Wis. 477; *Harvey v. Terre Haute, etc., R. Co.*, 74 Mo. 538, s. c. 6 Am. & Eng. R. Co. 293; *Miami, etc., Co. v. Port Royal, etc., R. Co.*, 38 S. Car. 78, s. c. 16 S. E. R. 339; *Ames v. First Div. St. Paul, etc., R. Co.*, 12 Minn. 412. As to when joint owners may maintain a joint action, see *Day v. Ridley*, 16 Vt. 48; *Missouri Pac. R. Co. v. Rushin*, 3 Tex. App. (Civil Cas.) 385; *Metcalfe v. London, etc., R. Co.*, 4 C. B. N. S. 307, and compare *Missouri Pac. R. Co. v. Smith*, 84 Tex. 348, s. c. 19 S. W. R. 509. See, also, *Wood v. Erie R. Co.*, 72 N. Y. 196; *ante*, § 1660.

<sup>3</sup> *Southern Exp. Co. v. Caperton*, 44

Ala. 101; *Southern Exp. Co. v. Armstead*, 50 Ala. 350; *South & North Alabama R. Co. v. Wood*, 72 Ala. 451, s. c. 18 Am. & Eng. R. Cas. 634; *Krulder v. Ellison*, 47 N. Y. 36; *Arbuckle v. Thompson*, 37 Pa. St. 170; *Dunlop v. Lambert*, 6 Cl. & Fin. 600; *Kirkpatrick v. Kansas City, etc., R. Co.*, 86 Mo. 341; *Bacharach v. Chester Freight Line*, 133 Pa. St. 414, s. c. 19 Atl. R. 409; *Potter v. Lansing*, 1 Johns. (N. Y.) 215, s. c. 3 Am. Dec. 310; *Lawrence v. Minturn*, 17 How. (U. S.) 100; *Madison, etc., R. Co. v. Whitesel*, 11 Ind. 55; *Pennsylvania Co. v. Poor*, 103 Ind. 553, s. c. 3 N. E. R. 253; *Ober v. Indianapolis, etc., R. Co.*, 13 Mo. App. 81; *Gwyn v. Richmond, etc., R. Co.*, 85 N. Car. 429, s. c. 39 Am. R. 708, 6 Am. & Eng. R. Cas. 452; *Dyer v. Great Northern R. Co.*, 51 Minn. 345, s. c. 53 N. W. R. 714; *Robinson v. Memphis, etc., R.*

But, if he has no property in the goods, either general or special and incurs no risk, he is not, ordinarily at least, the proper plaintiff.<sup>1</sup> If the consignor is the real owner, and especially if he makes the contract for himself, he is the proper plaintiff,<sup>2</sup> and the better rule seems to be that he may also maintain an action upon the contract in his own name if the contract is directly with him, although he has not, in reality, retained any property in the goods;<sup>3</sup> but in the latter case, if

Co., 9 Fed. R. 129; *Thompson v. Fargo*, 49 N. Y. 188; *Bonner v. Marsh*, 10 Smedes & M. (Miss.) 376; *Arnold v. Prout*, 51 N. H. 587, 589; *Browne on Carriers*, § 596.

<sup>1</sup> *Ogden v. Coddington*, 2 E. D. Smith (N. Y.) 317; *Alabama, etc., R. Co. v. Mount Vernon, etc., Co.*, 84 Ala. 173; *Coombs v. Bristol, etc., Co.*, 3 Hurlst. & N. 510; *Coats v. Chaplin*, L. R. 3 Q. B. 483; *Swain v. Shepherd*, 1 Moody & R. 223; *Hutchinson on Carriers*, (2d ed.) § 736. But consignee may sue when he is the party to the contract. *Mead v. Railway Co.*, 18 Wkly. R. 735.

<sup>2</sup> *Finn v. Western R. Co.*, 112 Mass. 524; *Coombs v. Bristol, etc., R. Co.*, 3 H. & N. 510; *Hoare v. Great Western R. Co.*, 25 W. R. 631; *Bernstine v. Express Co.*, 40 Ohio St. 451; *Wilson v. Wilson*, 26 Pa. St. 393; *Hays v. Stone*, 7 Hill (N. Y.) 128; *Turney v. Wilson*, 7 Yerger (Tenn.) 340, 27 Am. Dec. 515; *Hand v. Baynes*, 4 Whart. (Pa.) 204, 33 Am. Dec. 54; *Swain v. Shepherd*, 1 Moody & R. 223; *The Merrimack*, 8 Cranch (U. S.) 317; *Krulder v. Ellison*, 47 N. Y. 36; *O'Neill v. New York, etc., R. Co.*, 60 N. Y. 138; *Brill v. Grand Trunk R. Co.*, 20 U. C. C. P. 440; *Western, etc., R. Co. v. Kelly*, 1 Head (Tenn.) 158; *Pennsylvania Co. v. Clark*, 2 Ind. App. 146, s. c. 27 N. E. R. 586; *Spence & Neff v. Norfolk, etc., R. Co.*, (Va.)

29 L. R. A. 578; *Hance v. Wabash, etc., R. Co.*, 1 Mo. App. R. 719.

<sup>3</sup> *Blanchard v. Page*, 8 Gray (Mass.) 281; *Finn v. Western R. Co.*, 112 Mass. 524; *Hooper v. Chicago, etc., R. Co.*, 27 Wis. 81; *Atchison v. Chicago, etc., Co.*, 80 Mo. 213; *Reynolds v. Chicago, etc., Co.*, 85 Mo. 90; *Misouri Pac. R. Co. v. Smith*, 84 Tex. 348, s. c. 19 S. W. R. 509, 510; note to *Swift v. Pacific Mail, etc., Co.*, 30 Am. & Eng. R. Cas. 105; note to *Ramsey, etc., Co. v. Kelsea*, (55 N. J. L. 320) 22 L. R. A. 415, 428; *Illinois, etc., R. Co. v. Schwartz*, 13 Ill. App. 490; *Chicago, etc., R. Co. v. Shea*, 66 Ill. 471; *Ohio, etc., R. Co. v. Emrich*, 24 Ill. App. 245; *Cantwell v. Pacific Exp. Co.*, 58 Ark. 487, s. c. 25 S. W. R. 503; *Dunlop v. Lambert*, 6 Cl. & Fin. 600. *Contra*, *Blum, Frank & Co. v. The Caddo*, 1 Woods (U. S. C. C.) 64; *Dawes v. Peck*, 8 Term R. 330; *Green v. Clark*, 12 N. Y. 343; *Krulder v. Ellison*, 47 N. Y. 36; *Griffith v. Ingledew*, 6 Serg. & R. 429, (but see strong dissenting opinion of Gibson, J.); *Pennsylvania Co. v. Holderman*, 69 Ind. 18; *Sargent v. Morris*, 3 Barn. & Ald. 277. See, also, *Wetzel v. Power*, 5 Mont. 214. In *Shellenberg v. Fremont, etc., R. Co.*, 45 Neb. 487, s. c. 63 N. W. R. 859, it is held that the company is liable for conversion if it refuses to surrender the goods to the real owner, although he is not a party to the contract.

the property in the goods has passed to the consignee, the recovery by the consignor would be for the benefit of the consignee.<sup>1</sup> The question as to the proper party defendant can seldom arise, except where there are connecting carriers, and that subject has already been fully considered.<sup>2</sup>

§ 1693. **Actions against common carriers—Form of action.**—The abolition of forms of action in the code states and the modification of the strict common law rules in most of the other states have rendered the old rules and distinctions between the different forms of action of comparatively little importance. But the inherent distinctions in matters of substance are still recognized, and there still remains, in many cases, the right to make an election of remedies, which, where once exercised, may have an important influence upon the right to recover or the amount of the recovery. As a general rule, where there is a breach both of contract and of duty imposed by law, as in case of loss or injury by a common carrier, the plaintiff may elect to sue either in contract or in tort.<sup>3</sup>

<sup>1</sup> Ohio, etc., *R. Co. v. Emrich*, 24 Ill. App. 245; Illinois, etc., *R. Co. v. Schwartz*, 13 Ill. App. 490; Missouri, *Pac. R. Co. v. Smith*, 84 Tex. 348, s. c. 19 S. W. R. 509; Southern Exp. Co. v. Craft, 49 Miss. 480; *Snider v. Adams Exp. Co.*, 77 Mo. 523, s. c. 16 Am. & Eng. R. Cas. 261. As a general rule either the general owner of the goods or one who has a special property in them may sue, but a recovery by one will usually bar a subsequent action by the other. *Denver, etc., R. Co. v. Frame*, 6 Colo. 382; *Green v. Clark*, 13 Barb. 57; *Green v. Clarke*, 12 N. Y. 343; *Elkins v. Boston, etc., R. Co.*, 19 N. H. 337; *Owners of Steamboat Farmer v. McCraw*, 26 Ala. 189; *Houston, etc., R. Co. v. Stewart*, 1 Tex. App. (Civ. Cas.) 718; *Freeman v. Birch*, 3 Q. B. 492, note; *Swift v. Pacific Mail, etc., Co.*, 106 N. Y. 206, s. c. 30 Am. & Eng. R. Cas. 105; New

Jersey, etc., *Co. v. Merchants' Bank*, 6 How. (U. S.) 344; Illinois Cent. R. Co. v. Miller, 32 Ill. App. 259. As to the proper parties where loss has been paid by insurance company, see *ante*, § 1509.

<sup>2</sup> *Ante*, chapters LVIII, LIX. See, also, *Holsapple v. Rome, etc., R. Co.*, 86 N. Y. 275, s. c. 3 Am. & Eng. R. Cas. 487; *Baker v. Michigan, etc., R. Co.*, 42 Ill. 73.

<sup>3</sup> *Baltimore, etc., R. Co. v. Pumphrey*, 59 Md. 390, s. c. 9 Am. & Eng. R. Cas. 331; *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222, s. c. 11 Am. & Eng. R. Cas. 92, and note; *Catlin v. Adirondack Co.*, 11 Ab. N. Cas. (N. Y.) 377; *Central Trust Co. v. East Tenn., etc., R. Co.*, 70 Fed. R. 764; *Emigh v. Pittsburgh, etc., R. Co.*, 4 Biss. (U. S. C. C.) 114; *Orange Bank v. Brown*, 3 Wend. (N. Y.) 158; *St. Louis, etc., R. Co. v. Heath*, 41 Ark. 476; *Mississippi*

But it has been held in Indiana that where the plaintiff elects to sue in tort, or for a breach of the duty imposed by law, he can not recover if the evidence shows a special contract.<sup>1</sup> This may be correct where the plaintiff sues on an implied contract, but where he sues in tort for negligence, it seems to us that it can not be good law, for it would do away with the doctrine of election of remedies.<sup>2</sup> But the election of the plaintiff to sue in tort does not prevent the carrier from setting up a special contract as a defense, if it is not invalid and by its terms relieves the carrier from liability.<sup>3</sup> Generally the rules of law and the measure of damages will be the same in either form of action,<sup>4</sup> but this is not always true in all respects. In some jurisdictions, if the contract is a joint one by several defendants they must all be joined in an action on the contract, while if sued in tort, any one or more of them may be sued and the plaintiff will not be defeated because he fails to join all who are liable or fails to make out a case against all whom he has joined as defendants.<sup>5</sup> So, in some cases, punitive or exem-

Cent. R. Co. v. Fort, 44 Miss. 423; Pennsylvania R. Co. v. Peoples, 31 Ohio St. 537; Whittenton, etc., Co. v. Memphis, etc., Packet Co., 21 Fed. R. 896; Tattan v. Great Western R. Co., 2 Ell. & Ell. 844; 1 Elliott's Gen. Pr. 300; Pomeroy's Rem. & Remed. Rts., § 570; Bliss on Code Pl., § 14. As shown by these authorities, the common law form of action on the contract was *assumpsit* and in tort it was usually *case*.

<sup>1</sup> Lake Shore, etc., R. Co. v. Bennett, 89 Ind. 457; Hall v. Pennsylvania Co., 90 Ind. 459. The court regarded this as a fatal variance. See, also, Snow v. Indiana, etc., R. Co., 109 Ind. 422, s. c. 9 N. E. R. 702; Indianapolis, etc., R. Co. v. Forsythe, 4 Ind. App. 326, s. c. 29 N. E. R. 1138; Indianapolis, etc., R. Co. v. Remny, 13 Ind. 518; Kimball v. Railroad Co., 26 Vt. 247; Chicago, etc., R. Co. v. Hale, 2 Ill. App. 150; Camp v. Hart-

ford, etc., R. Co., 43 Conn. 333, 340; Boylan v. Hot Springs R. Co., 132 U. S. 146, s. c. 10 Sup. Ct. R. 50.

<sup>2</sup> See Saltonstall v. Stockton, Taney's Dec. 11; Clark v. St. Louis, etc., R. Co., 64 Mo. 440; Arnold v. Railroad Co., 83 Ill. 273; Wabash, etc., R. Co. v. Pratt, 15 Ill. App. 177; Clark v. Richards, 1 Conn. 53, 59, and authorities cited in the first note to this section. See, also, Central Trust Co. v. East Tenn., etc., R. Co., 70 Fed. R. 764, 767.

<sup>3</sup> Clark v. St. Louis, etc., R. Co., 64 Mo. 440; Oxley v. St. Louis, etc., R. Co., 65 Mo. 629; Boaz v. Central, etc., R. Co., 87 Ga. 463, s. c. 13 S. E. R. 711.

<sup>4</sup> Baltimore, etc., R. Co. v. Pumphrey, 59 Md. 390, s. c. 9 Am. & Eng. R. Cas. 331; St. Louis, etc., R. Co. v. Heath, 41 Ark. 476, s. c. 18 Am. & Eng. R. Cas. 557.

<sup>5</sup> Frink v. Potter, 17 Ill. 406; Breth-

plary damages may be recovered in tort, while only compensatory damages can be recovered in an action *ex contractu*.<sup>1</sup> And another advantage gained by suing in case at common law is that it may not be necessary to state the facts with as much particularity as in *assumpsit*, and a variance is less likely to be fatal.<sup>2</sup> On the other hand, the statute of limitations may bar an action in tort when it would not bar an action in contract,<sup>3</sup> and it may be desirable to join the common counts in *assumpsit*,<sup>4</sup> or, in the absence of a statute, the cause of action in tort will not survive, while it may do so in contract.<sup>5</sup> In a majority of cases it will make no difference whether the action is for breach of contract or for breach of the duty imposed by law; but it will frequently be found, if there is any choice, that an action for breach of duty is preferable, especially if the duty is greater and broader than the contract.<sup>6</sup>

§ 1694. **Actions against common carriers—Pleading.**—In order to determine whether the action is brought on the contract or in tort the courts will look to the nature of the cause of action stated in the complaint or declaration, and if no special contract is set out they will generally construe the pleading as founded on the tort.<sup>7</sup> Counts in tort and counts in

erton v. Wood, 3 Brod. & B. 54; Pozzi v. Shipton, 8 Ad. & E. 963; Ansell v. Waterhouse, 6 M. & S. 385, s. c. 2 Chitty 1; Smith v. Seward, 3 Pa. St. 342; Marshall v. York, etc., R. Co., 11 Com. B. 655, 7 Eng. L. & Eq. 519. See, also, Holsapple v. Rome, etc., R. Co., 86 N. Y. 275.

<sup>1</sup> New Orleans, etc., R. Co. v. Hurst, 36 Miss. 660; Walsh v. Chicago, etc., R. Co., 42 Wis. 23; Hamlin v. Great Northern R. Co., 1 H. & N. 408. See, also, Baylis v. Lintott, L. R. 8 C. P. 345; Wyld v. Pickford, 8 M. & W. 443, as to the advantage gained by suing in tort.

<sup>2</sup> Wyld v. Pickford, 8 M. & W. 443; Weed v. Saratoga, etc., R. Co., 19

Wend (N. Y.) 534; Chitty Pl., 312 *et seq.*

<sup>3</sup> The period of limitation, under most of the statutes, is shorter in actions for tort than in actions on contract.

<sup>4</sup> Hutchinson on Carriers (2d ed.), § 743.

<sup>5</sup> Hutchinson on Carriers (2d ed.), § 743.

<sup>6</sup> Thus, if there is a special contract limiting the duty and liability of the carrier, it is generally better to put the burden upon the carrier to show it, unless, as seems to be the case in Indiana, the existence of such a contract would be considered as a variance.

<sup>7</sup> Heirn v. McCaughan, 32 Miss. 17;



contract can not be joined in the same action.<sup>1</sup> If the action is brought on a special contract of affreightment the contract should be set out or stated correctly, for if a different contract is proved the variance may be fatal.<sup>2</sup> Thus if the complaint counts upon the breach of an oral contract, and it appears that the goods were shipped under a written contract differing from the alleged oral contract, there can be no recovery in such action.<sup>3</sup> But it has been held that a complaint averring that the defendant, for a valuable consideration, undertook to transport the plaintiff's goods from one place to another on its road and deliver them to the plaintiff within a reasonable time, and that it failed to do so within a reasonable time, is sufficient as against a general demurrer without alleging what was a reasonable time.<sup>4</sup> It has been held that where the action is founded on a special contract and a breach thereof, and resulting damage to the plaintiff, it is unnecessary to allege that the defendant is a common carrier;<sup>5</sup> but where the action is *ex delicto* for breach of duty it is generally necessary to aver that the defendant is a common carrier or facts equiv-

New Orleans, etc., R. Co. *v.* Hurst, 36 Miss. 660; Atlantic R. Co. *v.* Laird, 58 Fed. R. 760; Heil *v.* St. Louis, etc., R. Co., 16 Mo. App. 363; Frink *v.* Potter, 17 Ill. 406; Cregin *v.* Brooklyn, etc., R. Co., 75 N. Y. 192. But see School Dist. *v.* Boston, etc., R. Co., 102 Mass. 552.

<sup>1</sup> Norfolk, etc., R. Co. *v.* Wysor, 82 Va. 250; Bliss on Code Pl., § 112, *et seq.* *Contra*, Central Vermont R. Co. *v.* Soper, 59 Fed. R. 879.

<sup>2</sup> 1 Chitty Pl., 312, *et seq.*; Hughes *v.* Great Western R. Co., 14 Com. B. 637; Weed *v.* Saratoga, etc., R. Co., 19 Wend. (N. Y.) 534; Atlanta, etc., R. Co. *v.* Texas, etc., Co., 81 Ga. 602, s. c. 9 S. E. R. 600; Latham *v.* Rutley, 2 Barn. & C. 20; Shaw *v.* York, etc., R. Co., 13 Q. B. 347; Fairchild *v.* Slocum, 19 Wend. (N. Y.) 329. But see Hill *v.* Georgia, etc., R. Co., 43 S. Car. 461, s. c. 21 S. E. R. 337. In most jurisdictions,

where a written contract is the foundation of the action it must be set out in full either in the body of the complaint or as an exhibit. See Bliss on Code Pl., § 312; Clark *v.* St. Louis, etc., R. Co., 64 Mo. 440; Indianapolis, etc., R. Co. *v.* Remny, 13 Ind. 518.

<sup>3</sup> Waters *v.* Richmond, etc., R. Co., 110 N. Car. 338, s. c. 16 L. R. A. 834; Pennsylvania Co. *v.* Holderman, 69 Ind. 18; Snow *v.* Indiana, etc., R. Co., 109 Ind. 422, s. c. 9 N. E. R. 702. But see Guillaume *v.* General Transp. Co., 100 N. Y. 491.

<sup>4</sup> Palmer *v.* Atchison, etc., R. Co., 101 Cal. 187, s. c. 61 Am. & Eng. R. Cas. 235. But compare Freeman *v.* Louisville, etc., R. Co., 32 Fla. 420, s. c. 13 So. R. 893, Jeffersonville, etc., R. Co. *v.* Gent, 35 Ind. 39.

<sup>5</sup> Dunbar *v.* Port Royal, etc., R. Co., 36 So. Car. 110, s. c. 15 S. E. R. 357.

alent thereto.<sup>1</sup> Facts must be alleged, where the action sounds in tort, sufficient to show the duty and the breach thereof.<sup>2</sup> The plaintiff's right to maintain the action, as owner or otherwise, must be shown,<sup>3</sup> and so, generally, must delivery to the carrier if the action is for loss or injury to the goods.<sup>4</sup> The recovery will be limited to the issues, and it has been held that where the complaint counts entirely upon a non-delivery of the goods there can be no recovery thereunder for injury to the goods where the proof shows that they were delivered by the carrier.<sup>5</sup> At common law, whether the action was in *assumpsit* or in tort, it was generally sufficient for the carrier to plead the general issue,<sup>6</sup> and a general denial will often be sufficient in the code states, but as "new matter" must be specially pleaded under the codes it will sometimes be necessary, or at least advisable, to answer specially, as, for instance, in some cases where there is a contract limiting the liability of the carrier.<sup>7</sup>

<sup>1</sup> *Bristol v. Rensselaer, etc., R. Co.*, 9 Barb. (N. Y.) 158; *Marshall v. York, etc., R. Co.*, 11 Com. B. 655; *Tolledo, etc., R. Co. v. Roberts*, 71 Ill. 540; *Baltimore, etc., R. Co. v. Morehead*, 5 W. Va. 293; *Southern Exp. Co. v. McVeigh*, 20 Gratt. (Va.) 264; *Pozzi v. Shipton*, 8 Ad. & El. 963.

<sup>2</sup> *Baltimore, etc., R. Co. v. Wilson*, 31 Ohio St. 555. As to the sufficiency of allegations of negligence, see *Ruben v. Ludgate, etc., Co.*, 49 Hun 608, s. c. 17 N. Y. S. R. 17, and compare *Bowers v. Richmond, etc., R. Co.*, 107 N. Car. 721, s. c. 12 S. E. R. 452.

<sup>3</sup> *Pennsylvania Co. v. Holderman*, 69 Ind. 18; *Pennsylvania Co. v. Poor*, 103 Ind. 553, s. c. 3 N. E. R. 253; *Montgomery, etc., R. Co. v. Edmonds*, 41 Ala. 667.

<sup>4</sup> *Jordan v. Hazard*, 10 Ala. 221; *Missouri Pac. R. Co. v. Douglas*, 2 Tex. App. (Civ. App.) 32, s. c. 16 Am. & Eng. R. Cas. 98. See, also, *McFadden v. Missouri Pac. R. Co.*, 92 Mo. 343, s. c. 4 S. W. R. 689.

<sup>5</sup> *South & N. Ala. R. Co. v. Wilson*, 78 Ala. 587, s. c. 27 Am. & Eng. R. Cas. 41; *Alabama, etc., R. Co. v. Grabfelder*, 83 Ala. 200, s. c. 3 So. R. 432; *Nudd v. Wells*, 11 Wis. 407.

<sup>6</sup> *Hutchinson on Carriers*, (2nd ed.) § 758; *Illinois Cent. R. Co. v. Johnson*, 34 Ill. 389; *Ortt v. Minneapolis, etc., R. Co.*, 36 Minn. 396, s. c. 31 N. W. R. 519; *Brown v. Dunlap*, 3 So. Car. 101; *St. Louis, etc., R. Co. v. Knight*, 122 U. S. 79, s. c. 7 Sup. Ct. R. 1132. A mere denial by the carrier that it ever received the goods has been held insufficient to require the plaintiff to show a non-delivery to the consignee. *Hot Springs, etc., R. Co. v. Hudgins*, 42 Ark. 485, s. c. 18 Am. & Eng. R. Cas. 643.

<sup>7</sup> See *Missouri Pac. R. Co. v. Wichita, etc., Co.*, 55 Kan. 525, s. c. 40 Pac. R. 899; *Atchison, etc., R. Co. v. Bryan*, (Tex. Civ. App.) 28 S. W. R. 98; *Atchison, etc., R. Co. v. Ditmars*, (Kan.) 43 Pac. R. 833; *ante*, § 1438.

§ 1695. **Actions against common carriers—Evidence.**—No matter whether the plaintiff sues on the contract or upon the breach of duty, in order to recover damages for loss or injury to his goods by the carrier, he must prove, in general, a delivery to the carrier, an undertaking or contract, on its part either express or implied, to carry the goods, and its failure to perform the same according to its undertaking or duty.<sup>1</sup> In other words, he must show a duty owing to him by the defendant, which arises either out of contract or is imposed by law, a breach of that duty by the defendant, and damage caused thereby to himself. We have elsewhere fully considered what is sufficient evidence of the delivery, what evidence is admissible to prove the contract, what must be shown where there are connecting carriers, what presumptions arise in such cases, and upon whom rests the burden of proof, so that little remains to be said upon the subject of the plaintiff's evidence. The evidence must be responsive to the issues,<sup>2</sup> and the general rules governing the admissibility of evidence are substantially the same as in other cases.<sup>3</sup> As we have elsewhere shown, the carrier may defend by showing that the loss or injury was caused by

<sup>1</sup> Angell on Carriers, (5th ed.) § 461; Hutchinson on Carriers, (2nd ed.) § 759. Where the action is for breach of the common law duty, it must be shown that the defendant is a common carrier. *Ringgold v. Haven*, 1 Cal. 108. See, generally, *Missouri Pac. R. Co. v. Douglas*, 2 Tex. App. (Civ. Cas.) 32, s. c. 16 Am. & Eng. R. Cas. 98; *Houston, etc., R. Co. v. McGlosson*, 1 Tex. App. (Civ. Cas.) 89; *Northwestern, etc., Co. v. Burlington, etc., R. Co.*, 20 Fed. R. 712 (action for failing to receive and carry); *Little Rock, etc., R. Co. v. Conatser*, (Ark.) 33 S. W. R. 1057, (same); *Corso v. New Orleans, etc., R. Co.*, (La. Ann.) 20 So. R. 752.

<sup>2</sup> *Chicago, etc., R. Co. v. Hoeffner*, 44 Ill. App. 137; *Kyle v. Buffalo, etc., R. Co.*, 16 U. C. C. P. 76. See, also, *New England, etc., Co. v. Starin*, 60

Conn. 369, s. c. 22 Atl. R. 953; *Spurlock v. Missouri Pac. R. Co.*, 93 Mo. 530, s. c. 6 S. W. R. 349; *Missouri Pac. R. Co. v. Barnes*, 2 Tex. App. (Civ. Cas.) 507; *Wabash, etc., R. Co. v. Jaggerman*, 115 Ill. 407, s. c. 4 N. E. R. 641.

<sup>3</sup> As to opinion evidence, see, *Louisville, etc., R. Co. v. Natchez, etc., R. Co.*, 67 Miss. 399, s. c. 7 So. R. 350. As to when admissions and declarations of agents and employes are admissible against the carrier, see, *Union R., etc., Co. v. Riegel*, 73 Pa. St. 72; *Green v. Boston, etc., R. Co.*, 128 Mass. 221, s. c. 35 Am. R. 370; *Bennett v. Northern Pac. R. Co.*, 12 Ore. 49, s. c. 6 Pac. R. 160; *Queen v. Peters*, 16 New Bruns. 77, and compare *Bordentown, etc., Co. v. Flanagan*, 41 N. J. L. 115.

the act of God, the public enemy, public authority, the fault of the plaintiff, or the inherent nature of the goods. So, it may show, where there is a special contract exempting it from liability for loss or injury for certain causes, that the injury or loss was the result of one of the causes for which it is not responsible under its contract. Evidence that the conductor in charge of a train at the time goods were lost was skillful and competent,<sup>1</sup> or that goods lost from the carrier's depot were taken care of just as other goods of the same kind had always been taken care of by it, and that none had ever before been lost,<sup>2</sup> is inadmissible. But evidence that there was not room in the company's warehouse to store the plaintiff's goods at the particular time, that the warehouse was sufficient for the company's ordinary business, and that the defendant immediately notified the plaintiff to that effect, was held admissible in a recent case, in an action against the carrier for negligence in failing to safely store the goods.<sup>3</sup>

§ 1696. **Actions for injuries to passengers.**—In actions for injuries to passengers, the gist of the action is the same as in actions against common carriers for loss or injury to freight, that is, a breach of duty owing to the plaintiff by the defendant, and, as it may arise either out of the contract or be imposed by law on account of the relation of carrier and passenger, there may be the same election to sue either in contract or in tort. Ordinarily, however, such actions are founded on the tort or breach of duty imposed by law. In order to recover for a breach of the high duty due a passenger, the plaintiff must aver and prove the existence of the duty, that is, the relation of carrier and passenger, the negligence or breach of duty on the part of the defendant, and the resulting injury and damages to him. In many jurisdictions he must also allege and prove that he was free from contributory negligence. A general allegation of damages may permit proof of such as are

<sup>1</sup> *Montgomery, etc., R. Co. v. Edmonds*, 41 Ala. 667.

<sup>3</sup> *Stowe v. New York, etc., R. Co.*, 113 Mass. 521.

<sup>2</sup> *Lane v. Boston, etc., R. Co.*, 112 Mass. 455.

the usual and natural consequence of wrong complained of, or, in other words, such as naturally and proximately result therefrom; but in order to recover special damages he must allege and prove them.<sup>1</sup> He can only recover *secundum allegata et probata*, and, while in most jurisdictions negligence may be averred somewhat generally,<sup>2</sup> he can not charge negligence in one respect and recover for negligence in another and entirely different respect.<sup>3</sup> Unless the complaint shows that the passenger agreed to assume the risk, or that the liability of the company is limited by special contract, the carrier, if it relies upon such an agreement, must specially plead it.<sup>4</sup> So, if it relies upon a release by the plaintiff.<sup>5</sup> It has also been held that if the plaintiff has violated the rules of the carrier that is a matter of defense to be asserted by it.<sup>6</sup> As carriers of pas-

<sup>1</sup> Laing v. Colder, 8 Pa. St. 479; Hunter v. Stewart, 47 Me. 419; Walker v. Erie R. Co., 63 Barb. (N. Y.) 260; Kinney v. Crocker, 18 Wis. 74; Baldwin v. Western R. Co., 4 Gray (Mass.) 333; Smith v. St. Paul, etc., R. Co., 30 Minn. 169, s. c. 14 N. W. R. 797, 9 Am. & Eng. R. Cas. 262, and note; 1 Suth. on Dam., §§ 419, 421. In Gulf, etc., R. Co. v. Warlick, (Ind. Ter.) 35 S. W. R. 235, it was held that evidence of permanent injuries was not admissible when not alleged.

<sup>2</sup> See, for examples of general averments held sufficient in actions by passengers, Richmond City R. Co. v. Scott, 86 Va. 902, s. c. 11 S. E. R. 404; Carmanty v. Mexican, etc., R. Co., 5 La. Ann. 703; Gulf, etc., R. Co. v. Smith, 74 Tex. 276, s. c. 11 S. W. R. 1104; Pittsburgh, etc., R. Co. v. Theobald, 51 Ind. 246; Chattanooga, etc., R. Co. v. Huggins, 89 Ga. 494, s. c. 15 S. E. R. 848; Coudy v. St. Louis, etc., R. Co., 85 Mo. 79, s. c. 27 Am. & Eng. R. Cas. 282; Winter v. Central Iowa R. Co., 80 Iowa 443, s. c. 45 N. W. R. 737.

<sup>3</sup> Mayor v. Humphries, 1 C. & P. 251; Price v. St. Louis, etc., R. Co.,

72 Mo. 414, s. c. 3 Am. & Eng. R. Cas. 365; Breese v. Trenton R. Co., 52 N. J. L. 250; Cincinnati, etc., R. Co. v. McClain, (Ind.) 44 N. E. R. 306; Waldhiser v. Hannibal, etc., R. Co., 71 Mo. 514; Toledo, etc., R. Co. v. Beggs, 85 Ill. 80. See, also, Birmingham, etc., R. Co. v. Clay, (Ala.) 19 So. R. 309; ante, § 1628, p. 2545, note 2; Singleton v. Pacific R. Co., 41 Mo. 465; Memphis, etc., R. Co. v. Chastine, 54 Miss. 503; South & N. Ala. R. Co. v. Schaufler, 75 Ala. 136; North Birmingham St. R. Co. v. Calderwood, 89 Ala. 247, s. c. 2 Am. Neg. Cas. 43; Gulf, etc., R. Co. v. Scott, (Tex. Civ. App.) 27 S. W. R. 827; McManamee v. Missouri Pac. R. Co., (Mo.) 37 S. W. R. 119.

<sup>4</sup> Citizens' St. R. Co. v. Twiname, 111 Ind. 587, s. c. 13 N. E. R. 55; Louisville, etc., R. Co. v. Orr, 84 Ind. 50.

<sup>5</sup> Horton v. Horton, 83 Hun 213, s. c. 31 N. Y. Supp. 588; Johnson v. Kerr, 1 Serg. & R. (Pa.) 25; Corbett v. Lucas, 4 McCord 323.

<sup>6</sup> Whitehead v. St. Louis, etc., R. Co., 99 Mo. 263, s. c. 11 S. W. R. 751; Hicks v. Hannibal, etc., R. Co., 68 Mo. 329.

sengers are not insurers, like common carriers of goods, the plaintiff must show some negligence, or willfulness in a proper case, on the part of the carrier or its employes, which proximately caused his injury;<sup>1</sup> but, as we have elsewhere shown, a presumption of negligence on its part frequently arises against it in favor of a passenger sufficient to make a *prima facie* case so far as the negligence of the defendant is concerned, upon proof of the happening of an accident (so-called) under certain circumstances, and, owing to the high duty which a carrier owes to its passengers, slight evidence of negligence may often be sufficient. But a mere *scintilla* of evidence, conjecture or surmise that it may have been negligent will not justify a verdict against it.<sup>2</sup> In many jurisdictions, as we have said,

<sup>1</sup> *Pennsylvania R. Co. v. MacKinney*, 124 Pa. St. 462, s. c. 17 Atl. R. 14 (passenger struck by missile); *Wabash, etc., R. Co. v. Koenigsam*, 13 Ill. App. 505 (bridge down owing to unusual rain, and no evidence of negligence); *Henry v. St. Louis, etc., R. Co.*, 76 Mo. 288 (not proximate cause); *Sawyer v. Hannibal, etc., R. Co.*, 37 Mo. 240 (bridge destroyed by public enemy); *Sickles v. Missouri, etc., Co.*, (Tex. Civ. App.) 35 S. W. R. 493 (failure to heat car); *Chicago, etc., R. Co. v. Felton*, 125 Ill. 458, s. c. 17 N. E. R. 765; *Moore v. Edison, etc., Co.*, 43 La. Ann. 792, s. c. 9 So. R. 433; *St. Louis, etc., R. Co. v. Moore*, 14 Ill. App. 510 (hidden defect in material); *Pershing v. Chicago, etc., R. Co.*, 71 Iowa 561, s. c. 32 N. W. R. 488 (same); *Libby v. Maine, etc., R. Co.*, 85 Me. 34, s. c. 26 Atl. R. 943, 58 Am. & Eng. R. Cas. 81 (extraordinary flood); *Sullivan v. Jefferson, etc., R. Co.*, (Mo.) 34 S. W. R. 566 (passenger injured by match lighted by another passenger); *Morris v. New York, etc., R. Co.*, 106 N. Y. 678, s. c. 13 N. E. R. 455 (fall of parcel in car); *Gulf, etc., R. Co. v. Warlick*, (Ind. Ter.) 35 S. W. R. 235

(platform); *Ohio, etc., R. Co. v. Allender*, 59 Ill. App. 620 (ice on platform); *Davis v. Chicago, etc., R. Co.*, (Wis.) 67 N. W. R. 16, 1132; *Galveston, etc., R. Co. v. Long*, (Tex. Civ. App.) 36 S. W. R. 485 (injury of one passenger by another); note to *Ingalls v. Bills*, 43 Am. Dec. 346; note in 2 L. R. A. 252.

<sup>2</sup> *Toomey v. London, etc., R. Co.*, 3 Com. B. N. S. 146; *Cotton v. Wood*, 8 Com. B. N. S. 568; *Stern v. Michigan R. Co.*, 76 Mich. 591; *Curtis v. Rochester, etc., R. Co.*, 18 N. Y. 534; *Edgerton v. New York, etc., R. Co.*, 39 N. Y. 227; *LeBarron v. East Boston Ferry Co.*, 11 Allen (Mass.) 312; *Joy v. Winisimmet Co.*, 114 Mass. 63; *Stager v. Ridge, etc., Co.*, 119 Pa. St. 70, s. c. 12 Atl. R. 821; *Sherman v. Menominee, etc., Co.*, 77 Wis. 14, s. c. 45 N. W. R. 1079; *Babcock v. Fitchburg R. Co.*, 140 N. Y. 308, s. c. 35 N. E. R. 596. See, also, *Searles v. Manhattan R. Co.*, 101 N. Y. 661; *Toledo, etc., R. Co. v. Branagan*, 75 Ind. 490. It is not liable for a pure accident. *Hardwick v. Georgia, etc., R. Co.*, 85 Ga. 507, s. c. 11 S. E. R. 832; *Lewis v. Flint, etc., R. Co.*, 54 Mich. 55, s. c. 19 N. W. R. 744.

the burden is upon the plaintiff to prove his own freedom from contributory negligence, as well as the negligence of the defendant, and in all, he will be defeated, where negligence only is charged, if it is shown that his own negligence proximately contributed to his injury. It has also been held that his own fraud may defeat a recovery, as, for instance, where he rides upon another's non-transferable ticket or induces the conductor to carry him without paying any fare, in known violation of the rules of the company.<sup>1</sup>

§1697. **Actions for injuries to employes.**—In an action by an employe against a railroad company for damages for personal injuries claimed to have been caused by its negligence, he must allege and prove such negligence as the proximate cause of his injury,<sup>2</sup> and, in many jurisdictions the burden is also upon him to allege and prove freedom from contributory negligence on his part.<sup>3</sup> The fact that an accident occurred, and that it

<sup>1</sup> *Way v. Chicago, etc., R. Co.*, 64 Iowa 48, s. c. 19 N. W. R. 828, 52 Am. R. 431; *Toledo, etc., R. Co. v. Brooks*, 81 Ill. 245, 292; *Toledo, etc., R. Co. v. Beggs*, 85 Ill. 80; *Brevig v. Chicago, etc., R. Co.*, (Minn.) 66 N. W. R. 401; *Janny v. Great Northern R. Co.*, (Minn.) 65 N. W. R. 450.

<sup>2</sup> *Indianapolis, etc., R. Co. v. Love*, 10 Ind. 554; *Louisville, etc., R. Co. v. Orr*, 84 Ind. 50, s. c. 8 Am. & Eng. R. Cas. 94; *Henry v. Lake shore, etc., R. Co.*, 49 Mich. 495, s. c. 13 N. W. R. 832; *Philadelphia, etc., R. Co. v. Stebbing*, 62 Md. 504, s. c. 19 Am. & Eng. R. Cas. 36; *Hayes v. Mich. Cent. R. Co.*, 111 U. S. 228; *Johnson v. Chesapeake, etc., R. Co.*, 36 W. Va. 73, s. c. 14 S. E. R. 432; *Hudson v. Charleston, etc., R. Co.*, 104 N. Car. 491, s. c. 10 S. E. R. 669, 41 Am. & Eng. R. Cas. 348; *Murray v. Denver, etc., R. Co.*, 11 Colo. 124, s. c. 17 Pac. R. 484; *Fraker v. St. Paul, etc., R. Co.*, 32 Minn. 54, s. c. 19 N. W. R. 349; *Hanrath v. Northern, etc., R. Co.*, 46 Md.

280; *Sappenfield v. Main St., etc., R. Co.*, 91 Cal. 48, s. c. 27 Pac. R. 590; *East Tenn., etc., R. Co. v. Stewart*, 13 Lea (Tenn.) 432; *Crew v. St. Louis, etc., R. Co.*, 20 Fed. R. 87; *Texas, etc., R. Co. v. Crowder*, 76 Tex. 499, s. c. 13 S. W. R. 381; *Gulf, etc., R. Co. v. Knott*, (Tex. Civ. App.) 36 S. W. R. 491; *Alabama, etc., R. Co. v. Bailey*, (Ala.) 20 So. R. 313; *Dowell v. Burlington, etc., R. Co.*, 62 Iowa, 629, s. c. 17 N. W. R. 901; *Wheelan v. Chicago, etc., R. Co.*, 85 Iowa, 167, s. c. 52 N. W. R. 119, 49 Am. & Eng. R. Cas. 693; *Patterson's Ry. Acc. Law*, 483; note in 8 L. R. A. 636; *Beach on Contrib. Neg.*, § 32, note on page 41. The company is not liable for a pure accident. *Wabash, etc., R. Co. v. Locke*, 112 Ind. 404, s. c. 14 N. E. R. 391; *Armour v. Ryan*, 61 Ill. App. 314; *Handelun v. Burlington, etc., R. Co.*, 72 Iowa 709, s. c. 32 N. W. R. 4.

<sup>3</sup> A general averment to this effect is held sufficient, but if the specific averments show that he was guilty of con-

was possible to prevent it, if the company had anticipated it, is not the legal test of negligence on the part of the company,<sup>1</sup> and, as a general rule, no presumption of negligence on the part of the company arises in his favor; such as often arises where a passenger is injured, from the mere happening of an accident and injury to the employee.<sup>2</sup> Negligence may be pleaded somewhat generally,<sup>3</sup> and a complaint is not bad as against a demurrer, because it alleges that the defendant, or the defendant by its servants and agents, performed the negligent act complained of, without stating the name of the servant or agent.<sup>4</sup> But the complaint should show in what respect the

tributory negligence they will control. *Spencer v. Ohio, etc., R. Co.*, 130 Ind. 181, s. c. 29 N. E. R. 915; *Stewart v. Pennsylvania Co.*, 130 Ind. 242, s. c. 29 N. E. R. 916; *Ivens v. Cincinnati, etc., R. Co.*, 103 Ind. 27.

<sup>1</sup> *Augerstein v. Jones*, 139 Pa. St. 183, s. c. 21 Atl. R. 24; *Beatty v. Central, etc., R. Co.*, 58 Iowa 242, s. c. 12 N. W. R. 332, 8 Am. & Eng. R. Cas. 210; *Chicago, etc., R. Co. v. Stumps*, 55 Ill. 367; *Muirhead v. Hannibal, etc., R. Co.*, 19 Mo. App. 634; *Chicago, etc., R. Co. v. Armstrong*, 62 Ill. App. 228.

<sup>2</sup> *De Vau v. Pennsylvania, etc., R. Co.*, 130 N. Y. 632, s. c. 28 N. E. R. 532; *Wabash, etc., R. Co. v. Locke*, 112 Ind. 404, s. c. 14 N. E. R. 391; *Bohn v. Chicago, etc., R. Co.*, 106 Mo. 429, s. c. 17 S. W. R. 580; *Kincaid v. Oregon, etc., R. Co.*, 22 Ore. 35, s. c. 29 Pac. R. 3, 53 Am. & Eng. R. Cas. 218; *Puffer v. Chicago, etc., R. Co.*, (Minn.) 68 N. W. R. 39; *Joliet Steel Co. v. Shields*, 146 Ill. 603, s. c. 34 N. E. R. 1108; *Short v. New Orleans, etc., R. Co.*, 69 Miss. 848, s. c. 13 So. R. 826; *Brymer v. Southern Pac. R. Co.*, 90 Cal. 496, s. c. 27 Pac. R. 371; *Minty v. Union Pac. R. Co.*, 2 Idaho 437, s. c. 21 Pac. R. 660; *Henry v. Brackenridge, etc., Co.*, (La.) 20 So. R. 221; *Donovan v. Hartford St. R. Co.*, 65 Conn. 201, s. c. 32 Atl. R. 350.

<sup>3</sup> See, for instance, *Condon v. Missouri Pac. R. Co.*, 78 Mo. 567, s. c. 17 Am. & Eng. R. Cas. 583; *Carey v. Chicago, etc., R. Co.*, 67 Wis. 608, s. c. 31 N. W. R. 163; *Harper v. Norfolk, etc., R. Co.*, 36 Fed. R. 102; *Georgia Pac. R. Co. v. Davis*, 92 Ala. 300, s. c. 9 So. R. 252; *Johnston v. Canadian Pac. R. Co.*, 50 Fed. R. 886; *Wilson v. Denver, etc., R. Co.*, 7 Colo. 101, s. c. 2 Pac. R. 1; *Cleveland, etc., R. Co. v. Wynant*, 100 Ind. 160. In an action for damages for injury caused by a fellow-servant on the ground that the company knew that he was incompetent it is not necessary to name the particular officers having notice thereof. *Lake Shore, etc., R. Co. v. Stupak*, 123 Ind. 210, s. c. 23 N. E. R. 246. Nor to set out the particulars constituting the incompetency. *Johnston v. Canadian Pac. R. Co.*, 50 Fed. R. 886.

<sup>4</sup> *Ohio, etc., R. Co. v. Collarn*, 73 Ind. 261, s. c. 38 Am. R. 134; *Wabash R. Co. v. Savage*, 110 Ind. 156; *Louisville, etc., R. Co. v. Kendall*, 138 Ind. 313, s. c. 36 N. E. R. 415; *Cramer v. Union Pac. R. Co.*, 3 Utah 504, s. c. 24 Pac. R. 911; *Lessard v. Northern Pac. R. Co.*, 81 Wis. 189, s. c. 51 N. W. R. 321. See *Wild v. Oregon, etc., R. Co.*, 21 Ore. 159, s. c. 27 Pac. R. 954. But see *Burns v. Chicago, etc.,*



defendant was negligent,<sup>1</sup> and the plaintiff's evidence and right to recover will usually be limited to the negligence charged in his complaint.<sup>2</sup> Thus, where the complaint counts upon negligence in allowing the track to become defective, evidence is usually inadmissible to show negligence in the management of the train or the incompetency of a fellow-servant, and there can be no recovery upon the latter ground.<sup>3</sup> So, if the complaint merely charges that the negligence was that of an employe of the company, it should show that he was such an employe, or that his duties were such, as that his negligence in

R. Co., 69 Iowa 450, s. c. 30 N. W. R. 25; *Southern R. Co. v. Cunningham*, (Ala.) 20 So. R. 639. A motion to make more specific might be proper in some cases of this kind.

<sup>1</sup>*Knahlta v. Oregon, etc., R. Co.*, 21 Ore. 136, s. c. 27 Pac. R. 91; *Omaha, etc., R. Co. v. Wright*, 47 Neb. 886, 66 N. W. R. 842; *Batterson v. Chicago, etc., R. Co.*, 49 Mich. 184, s. c. 13 N. W. R. 508.

<sup>2</sup>*Harty v. St. Louis, etc., R. Co.*, 95 Mo. 368, s. c. 8 S. W. R. 562; *Ely v. Railroad Co.*, 77 Mo. 34; *Mueller v. Lake Shore, etc., R. Co.*, (Mich.) 63 N. W. R. 416; *Eckles v. Norfolk, etc., R. Co.*, (Va.) 25 S. E. R. 545; *Mitchell v. Prange*, (Mich.) 67 N. W. R. 1096; *Florida Cent. R. Co. v. Williams*, (Fla.) 20 So. R. 558; *Thomas v. Louisville, etc., R. Co.*, (Ky.) 35 S. W. R. 910; *Wilkinson v. Pensacola, etc., R. Co.*, 35 Fla. 83, 17 So. R. 71; *ante*, § 1696 p. 2703, note 3. If there is no right to recover on one charge of negligence, error in submitting that question to the jury is not cured because they might have found negligence in another respect also charged. *Northern Pac. R. Co. v. Charless*, 162 U. S. 359, s. c. 16 Sup. Ct. R. 848. So, where a complaint is based upon the theory that it takes several defects or acts of negligence to make the cause of action relied on, it may be necessary to prove

all in order to entitle the plaintiff to recover thereunder. *Terre Haute, etc., R. Co. v. McCorkle*, 140 Ind. 613, s. c. 40 N. E. R. 62; *Wormsdorf v. Detroit, etc., R. Co.*, 75 Mich. 472, s. c. 42 N. W. R. 1000, 40 Am. & Eng. R. Cas. 271.

<sup>3</sup>*Chicago, etc., R. Co. v. Swett*, 45 Ill. 197. See, also, *De Bolt v. Kansas City, etc., R. Co.*, 123 Mo. 496, s. c. 27 S. W. R. 575; *Houston, etc., R. Co. v. Farrell*, (Tex. Civ. App.) 27 S. W. R. 942. But it has been held that the incompetency of a servant managing machinery may be shown where the complaint charges gross negligence in the operation of such machinery. *Wood v. Heiges*, (Md.) 34 Atl. R. 872. One can not sue as an employe and recover as a passenger. *Evansville, etc., R. Co. v. Barnes*, 137 Ind. 306, s. c. 36 N. E. R. 1092. See, also, *Mexican, etc., R. Co. v. Crum*, 6 Tex. Civ. App. 702, 25 S. W. R. 1126; *Galveston, etc., R. Co. v. Herring*, (Tex. Civ. App.) 36 S. W. R. 129; *Becker v. Baumgartner*, 5 Ind. App. 576, s. c. 32 N. E. R. 786; *Chicago, etc., R. Co. v. Mehlsack*, 44 Ill. App. 124. But compare *McCaslin v. Lake Shore, etc., R. Co.*, 93 Mich. 553, s. c. 53 N. W. R. 724; *Georgia, etc., R. Co. v. Miller*, 90 Ga. 571, s. c. 16 S. E. R. 939; *New York, etc., R. Co. v. Green*, (Tex. Civ. App.) 36 S. W. R. 812.

the respect complained of should be deemed to be the negligence of the company,<sup>1</sup> and if it shows on its face that he was a fellow-servant of the plaintiff it may be held bad on demurrer.<sup>2</sup> It is frequently necessary where the injury is caused by some defect in machinery, appliances, or the like, to aver that the defendant had knowledge thereof, or to state facts showing that, in the exercise of ordinary and reasonable care with respect to a duty due from it to the plaintiff it ought to have had such knowledge, and the plaintiff did not have knowledge thereof.<sup>3</sup> It has also been held that if the injury results from an obvious defect and the plaintiff alleges that the company promised to remedy it, but failed to do so, he must also aver that he was injured within such time after the promise as would have been reasonable, under the circumstances, to allow for its performance.<sup>4</sup> As we have elsewhere shown, evidence of subsequent repairs or increased precautions after an accident is inadmissible to show antecedent negligence.<sup>5</sup> So, on the

<sup>1</sup> *Helfrich v. Williams*, 84 Ind. 553. See, also, *Texas, etc., R. Co. v. Harrington*, 62 Tex. 597, s. c. 21 Am. & Eng. R. Cas. 571.

<sup>2</sup> *East St. Louis, etc., R. Co. v. Dwyer*, 41 Ill. App. 522; *Joliet Steel Co. v. Shields*, 134 Ill. 209, s. c. 25 N. E. R. 569, holding that where the complaint charges negligence of other servants it must allege that they were not fellow-servants.

<sup>3</sup> *Bogenschutz v. Smith*, 84 Ky. 330, s. c. 1 S. W. R. 578; *Chicago, etc., R. Co. v. Fry*, 131 Ind. 319, s. c. 28 N. E. R. 989; *Indiana, etc., R. Co. v. Dailey*, 110 Ind. 75, s. c. 10 N. E. R. 631; *Norfolk, etc., R. Co. v. Jackson*, 85 Va. 489, s. c. 8 S. E. R. 370; *Current v. Missouri Pac. R. Co.*, 86 Mo. 62; *Louisville, etc., R. Co. v. Sandford*, 117 Ind. 265, s. c. 19 N. E. R. 770; *Griffiths v. London, etc., R. Co.*, L. R. 13 Q. B. Div. 259, 33 W. R. 35; *Klochinski v. Shores, etc., Co.*, (Wis.) 67 N. W. R. 934; *ante*, § 1311. But see

*Warner v. Western R. Co.*, 94 N. Car. 250, s. c. 25 Am. & Eng. R. Cas. 432; *Branch v. Port Royal, etc., R. Co.*, 35 So. Car. 405, s. c. 14 S. E. R. 808; *Chicago, etc., R. Co. v. Hines*, 132 Ill. 161, s. c. 23 N. E. R. 1021; *O'Connor v. Illinois Cent. R. Co.*, 83 Iowa, 105, s. c. 48 N. W. R. 1002; *Cole v. Chicago, etc., R. Co.*, 67 Wis. 272, s. c. 30 N. W. R. 600. In *Mayes v. Chicago, etc., R. Co.*, 63 Iowa, 562, s. c. 14 N. W. R. 340, it is held that if the company seeks to defend on the ground that the employe remained in its service after knowing of the defects and thus waived its negligence it must plead such defense affirmatively. Mere knowledge might not necessarily show contributory negligence, but we think it would usually show an assumption of the risk.

<sup>4</sup> *Stephenson v. Duncan*, 73 Wis. 404, s. c. 41 N. W. R. 337.

<sup>5</sup> *Ante*, § 1177; *Columbia, etc., R. Co. v. Hawthorne*, 144 U. S. 202, s. c.

other hand, evidence that the plaintiff was negligent at some other time is inadmissible to show that he was guilty of contributory negligence at the time he received the injury of which he complains.<sup>1</sup> As a general rule at least, the defendant will not be permitted to escape liability in an action for not furnishing reasonably safe machinery by showing that it is the custom of other companies to furnish similar unsafe machinery or appliances.<sup>2</sup> But, as bearing on the question of negligence, it may show that other well regulated and prudently managed companies use similar machinery or appliances.<sup>3</sup> The company is not estopped from denying its liability to the employee by proof that it paid his surgeon's bill.<sup>4</sup> We have elsewhere considered the effect of a release of liability by the employee.<sup>5</sup>

12 Sup. Ct. R. 591; *Sappenfield v. Main St., etc., R. Co.*, 91 Cal. 48, s. c. 27 Pac. R. 590; *Shinners v. Proprietors, etc.*, 154 Mass. 168, s. c. 28 N. E. R. 10; *Lang v. Sanger*, 76 Wis. 71, s. c. 44 N. W. R. 1095; *Morse v. Minneapolis, etc., R. Co.*, 30 Minn. 465; *Atchison, etc., R. Co. v. Parker*, 55 Fed. R. 595; *Motey v. Pickle, etc., Co.*, 74 Fed. R. 155. So, as to similar accidents. *Dye v. Delaware, etc., R. Co.*, 130 N. Y. 671, s. c. 29 N. E. R. 320, 53 Am. & Eng. R. Cas. 286. See, also, *Buckalew v. Tennessee, etc., Co.*, (Ala.) 20 So. R. 606; *Sullivan v. Salt Lake City, (Utah)* 44 Pac. R. 1039.

<sup>1</sup> *Atlanta, etc., R. Co. v. Johnson*, 66 Ga. 259; *Kaillen v. Northwestern, etc., Co.*, 46 Minn. 187, s. c. 48 N. W. R. 779. See *Michigan Cent. R. Co. v. Gilbert*, 46 Mich. 176, s. c. 9 N. W. R. 243. So, as to evidence of his habits as to sobriety and carefulness, *Illinois Cent. R. Co. v. Borders*, 61 Ill. App. 55. But where negligence in knowingly retaining an incompetent servant is charged, his general reputation for incompetency on the road may be shown. *Baltimore, etc., R. Co. v. Henthorne*, 73 Fed. R. 634; *Lake Shore, etc., R. Co. v. Stupak*, 123 Ind.

210, s. c. 23 N. E. R. 246; *Texas, etc., R. Co. v. Johnson*, (Tex.) 35 S. W. R. 1042.

<sup>2</sup> *Lake Erie, etc., R. Co. v. Mugg*, 132 Ind. 168, s. c. 31 N. E. R. 564; *Allen v. Burlington, etc., R. Co.*, 64 Iowa 94, s. c. 19 N. W. R. 870; *Jenkins v. Hooper, etc., Co.*, (Utah) 44 Pac. R. 829. As to admissibility of custom or usual practice in doing an act, see, *Hissong v. Richmond, etc., R. Co.*, 91 Ala. 514, s. c. 8 So. R. 776; *Whitsett v. Chicago, etc., R. Co.*, 67 Iowa 150, s. c. 25 N. W. R. 104; *Jeffrey v. Keokuk, etc., R. Co.*, 56 Iowa, 546, s. c. 9 N. W. R. 884; *Thompson v. Boston, etc., R. Co.*, 153 Mass. 391, s. c. 26 N. E. R. 1070; *Southern Kansas R. Co. v. Robbins*, 43 Kan. 145, s. c. 23 Pac. R. 113, 41 Am. & Eng. R. Cas. 316; *Spaulding v. Chicago, etc., R. Co.*, (Iowa) 67 N. W. R. 227; *Missouri, etc., R. Co. v. Crane*, (Tex. Civ. App.) 35 S. W. R. 797.

<sup>3</sup> *Holland v. Tennessee, etc., R. Co.*, 91 Ala. 444, s. c. 8 So. R. 524. See, also, *Pennsylvania Co. v. Hankey*, 93 Ill. 580.

<sup>4</sup> *Weeks v. New Orleans, etc., R. Co.*, 32 La. Ann. 615.

<sup>5</sup> *Ante*, §§ 1376, 1377. See, also, as to

§ 1698. **Pleading ordinances.**—It is laid down as a general rule by many courts and text-writers that courts other than the local municipal courts will not take judicial knowledge of ordinances and that they must be pleaded in order to be admitted in evidence.<sup>1</sup> Most of the cases, however, in which the rule was thus stated were actions or prosecutions upon or for the violation of ordinances, or in which they were directly sought to be enforced. In some of the cases it was held that the section of the ordinance involved should be set out *in hæc verba*, in others that its substance at least must be stated, while in a few others it was held sufficient to refer to the ordinance by its title and date of passage. In many of the states the latter mode of pleading an ordinance is authorized by statute. We think that, while there may not be so much reason for requiring an ordinance to be set out where it is relied upon to charge a railroad company with negligence, yet it ought to be in some way pleaded and identified. To admit an ordinance in evidence without pleading it would, we think, not only be in violation of the general rule that judicial notice will not be taken of ordinances and private statutes and that they must be pleaded and proved, but would also violate the elementary rule that the complaint must proceed on a single definite theory and that the evidence must correspond with the allegations and be con-

when and how it may be set aside and the necessity of a tender the following recent cases: *Och v. Missouri*, etc., R. Co., 130 Mo. 27, 31 S. W. R. 962; *Drohan v. Lake Shore*, etc., R. Co., 162 Mass. 435, s. c. 38 N. E. R. 1116; *Barker v. Northern Pac. R. Co.*, 65 Fed. R. 460, with which compare *Stewart v. Chicago*, etc., R. Co., 141 Ind. 55, s. c. 40 N. E. R. 67.

<sup>1</sup> *City Council v. Ashley*, etc., Co., 34 S. Car. 541, s. c. 13 S. E. R. 845; *Keeler v. Milledge*, 24 N. J. L. 142; *City of Huntington v. Pease*, 56 Ind. 305; *Whitson v. Franklin*, 34 Ind. 392; *City of Winona v. Burke*, 23 Minn. 254; *Inhabitants of Lewiston v. Fairfield*, 47 Me. 481; *Fink v. Mil-*

*waukee*, 17 Wis. 26; *State v. Soragan*, 40 Vt. 450; *Porter v. Waring*, 69 N.Y. 250; *Lucker v. Commonwealth*, 4 Bush (Ky.) 440; *Goodrich v. Brown*, 30 Iowa 291; *City of McPherson v. Nichols*, 48 Kan. 430, s. c. 29 Pac. R. 679; *Central Sav. Bank v. Mayor*, 71 Md. 515, s. c. 18 Atl. R. 809, 20 Atl. R. 283; *Pomeroy v. Lappeus*, 9 Ore. 363; *City of Greeley v. Hamman*, 12 Colo. 94, s. c. 20 Pac. R. 1; *Pittsburgh*, etc., R. Co. v. *Moore*, 33 Ohio St. 384; 1 *Beach Pub. Corp.*, § 532; *Bliss on Code Pl.*, §§ 182, 186, and notes; *Maxwell on Code Pl.*, 89, 738, note; *Phillips on Code Pl.*, §§ 340, 378; *Horr & Beamie on Mun. and Police Ord.*, § 174.

fined to the point in issue. It is also but just that the defendant should have notice of the plaintiff's claim. If no ordinance is pleaded in any way the defendant might well assume that the plaintiff relied solely on its breach of a common law duty, and if the plaintiff does rely on an ordinance of which the courts will not take judicial notice it would be unfair to require the defendant to take notice of it unless it is in some way pointed out. So, if the violation of an ordinance is relied upon as negligence *per se*, or even *prima facie* evidence of negligence, especially where there is nothing in the case which would constitute negligence in the absence of an ordinance, it is difficult to see why the ordinance is not just as much the foundation of the action as where suit is brought directly for the penalty for its violation. There are authorities holding that it must be pleaded in either case. Thus, in a recent action for damages to the plaintiff's building by a fire which the defendant had set in a pile of rubbish in close proximity thereto the judgment of the trial court was reversed on appeal because an ordinance prohibiting the setting of fires within the city limits was admitted in evidence without being pleaded.<sup>1</sup> The court said: "It is true that it was not claimed that the violation of the ordinance was negligence *per se*, but it was claimed that it was evidence which the jury might take into account as to the negligence of the defendants. The defendants were entitled to notice of this claim."<sup>2</sup> This was quoted with approval and followed in a recent case in an action against a street railway company.<sup>3</sup> Other decisions in similar cases are to the same effect,<sup>4</sup> and the rule is thus stated by a careful text-writer:<sup>5</sup> "Although a valid statute or ordinance limiting the rate of speed is admissible in evidence its existence and violation should first be pleaded, and an averment

<sup>1</sup> Richter v. Harper, 95 Mich. 221, 227, s. c. 54 N. W. R. 768, 770.

<sup>2</sup> Citing 1 Dill. Mun. Corp., § 83.

<sup>3</sup> Gardner v. Detroit St. R. Co., 99 Mich. 182, s. c. 4 Am. Neg. Cas. 163, 167.

<sup>4</sup> Illinois Cent. R. Co. v. Godfrey, 71

Ill. 500, s. c. 22 Am. R. 112, 117; Chicago, etc., R. Co. v. Klauber, 9 Ill. App. 613; Blanchard v. Lake Shore, etc., R. Co., 126 Ill. 416, 425. See, also, Shanfelter v. Mayor, 80 Md. 483, 31 Atl. R. 439.

<sup>5</sup> Booth on Street Railways, § 359.

that the car was running at a high rate of speed, contrary to law or to the provisions of a statute or ordinance, is not an allegation of the existence of the ordinance." But it has been held, on the other hand, that the averment of the existence of the ordinance is sufficient in such a case without setting out a copy thereof in the complaint,<sup>1</sup> and in another recent case it is intimated that an allegation that the plaintiff's injury was caused by running a train at a designated speed, in violation of the ordinance of the city, is sufficient, although the point actually decided was that it was sufficient after verdict and judgment and that the defendant had waived the question by not objecting on that ground at the time the ordinance was offered in evidence.<sup>2</sup> It is difficult to lay down any general rule which would be applicable in all jurisdictions, but we think that when an ordinance is relied on it should be pleaded in some way, so as to give the defendant notice of the plaintiff's claim and justify the admission of the ordinance as within the theory of the complaint, and that it should at least be identified by its title and date of passage or by pleading its substance or tenor and effect, although it is probably unnecessary in many jurisdictions to set it out *in hæc verba*.<sup>3</sup>

**§ 1699. Inspection and physical examination of party.**—It is well settled that, in an action for damages for personal injuries, the plaintiff may be permitted, while testifying as a witness in his own behalf, to exhibit the injured part to the jury.<sup>4</sup> It is also held, in some jurisdictions, that the plaintiff

<sup>1</sup> *Lake Erie, etc., Co. v. Hancock*, (Ind. App.) 43 N. E. R. 659. Citing *Madison, etc., R. Co. v. Taffe*, 37 Ind. 361; *St. Louis, etc., R. Co. v. Mathias*, 50 Ind. 65. See, also, *Winter v. Central Iowa R. Co.*, 80 Iowa 443, s. c. 45 N. W. R. 737.

<sup>2</sup> *St. Louis, etc., R. Co. v. Eggmann*, 161 Ill. 155, 43 N. E. R. 620.

<sup>3</sup> In nearly all cities of any size there are hundreds of ordinances, many of them, perhaps, on the same general subject, and it is manifestly unjust to require the defendant to

take notice of them and single out the particular one relied on where the courts take no judicial notice of them and the one relied upon is in no way identified. To allege that the act of the defendant was contrary to the laws and ordinances of the city is a mere conclusion which adds little, if anything to the complaint, gives the defendant no notice of any particular ordinance, and is not equivalent to an averment of the existence and violation of any particular ordinance.

<sup>4</sup> *Indiana Car Co. v. Parker*, 100 Ind.

may be compelled to exhibit it or submit to a surgical examination before trial,<sup>1</sup> but there are nearly an equal number of authorities to the contrary.<sup>2</sup> The mere fact that a surgeon examined the plaintiff out of court, and in the absence of the defendant, will not render his evidence inadmissible, if it is otherwise competent.<sup>3</sup>

181; *Mulhado v. Brooklyn City R. Co.*, 30 N. Y. 370; *Barker v. Town of Perry*, 67 Iowa 146, s. c. 25 N. W. R. 100; *Hess v. Lowrey*, 122 Ind. 225, s. c. 7 L. R. A. 90; *Langworthy v. Township of Green*, 95 Mich. 93, s. c. 54 N. W. R. 697; *Newport News, etc., Co. v. Carroll*, (Ky.) 31 S. W. R. 132; *Townsend v. Briggs*, 99 Cal. 481, s. c. 32 Pac. R. 307. But compare *French v. Wilkinson*, 93 Mich. 322, s. c. 53 N. W. R. 530. Physician may exhibit plaintiff to jury in testifying as to the nature and effect of the injury. *Citizens' St. R. Co. v. Willoebey*, 134 Ind. 563, s. c. 33 N. E. R. 627, 58 Am. & Eng. R. Cas. 485; *Cunningham v. Union Pac. R. Co.*, 4 Utah 206, s. c. 7 Pac. R. 795; *City of Lanark v. Dougherty*, 153 Ill. 163, s. c. 38 N. E. R. 892. And it has been held that the defendant may have an examination of the injured part by experts in open court, where the plaintiff has already exhibited it to the jury. *Haynes v. Town of Trenton*, 123 Mo. 326, s. c. 27 S. W. R. 622.

<sup>1</sup> *St. Louis, etc., R. Co. v. Dobbins*, 60 Ark. 481, s. c. 30 S. W. R. 887; *Sibley v. Smith*, 46 Ark. 275; *Schroeder v. Chicago, etc., R. Co.*, 47 Iowa 375; *White v. Milwaukee City R. Co.*, 61 Wis. 536, s. c. 50 Am. R. 154, and note; *Alabama, etc., R. Co. v. Hill*, 90 Ala. 71, s. c. 9 L. R. A. 442; *Atchison, etc., R. Co. v. Thul*, 29 Kan. 466, s. c. 44 Am. R. 659; *Graves v. Battle Creek*, 95 Mich. 266, s. c. 54 N. W. R. 757; *Hatfield v. St. Paul, etc., R. Co.*,

33 Minn. 130. See, also, *Richmond, etc., R. Co. v. Childress*, 82 Ga. 719, s. c. 3 L. R. A. 808; *Shepard v. Missouri Pac. R. Co.*, 85 Mo. 629, s. c. 55 Am. R. 390; and articles by Judge Thompson in 25 Cent. L. J. 3. In *City of Chadron v. Glover*, 43 Neb. 732, s. c. 62 N. W. R. 62, it is said that it has been intimated in several cases in Nebraska that the court has power to order an examination before trial, but has never been expressly decided in that state.

<sup>2</sup> *Union Pac. R. Co. v. Botsford*, 141 U. S. 250, s. c. 11 Sup. Ct. R. 1000; *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401; *Peoria, etc., R. Co. v. Rice*, 144 Ill. 227, s. c. 33 N. E. R. 951; *McQuigan v. Delaware, etc., R. Co.*, 129 N. Y. 50, s. c. 29 N. E. R. 235; *Cole v. Fall Brook, etc., Co.*, 87 Hun 584, s. c. 34 N. Y. Supp. 572; *Newman v. Third Ave. R. Co.*, 50 N. Y. Super. Ct. 412. In *Lloyd v. Hannibal, etc., R. Co.*, 53 Mo. 509, s. c. 4 Am. Neg. Cas. 481, it is said a physical examination of the plaintiff by surgeons during the trial is a proceeding unknown to the law, and that the court has no power to enforce an order therefor. See, also, *Southern Bell Tel. Co. v. Lynch*, 95 Ga. 529, 20 S. E. R. 500; *Lyon v. Manhattan R. Co.*, 142 N. Y. 298, s. c. 37 N. E. R. 113; *Gulf, etc., R. Co. v. Nelson*, 5 Texas Civ. App. 387, s. c. 24 S. W. R. 588.

<sup>3</sup> *Louisville, etc., R. Co. v. Falvey*, 104 Ind. 409, 417, s. c. 3 N. E. R. 389, 4 N. E. R. 908.

§ 1700. **Experiments and practical tests—Real evidence.**—The clothing of one who is killed by the alleged negligence of a railroad company may, it seems, be exhibited in evidence where it tends to establish such negligence as the cause of his death,<sup>1</sup> and other “real evidence” such as defective machinery, iron rails, and the like may be introduced and exhibited to the jury in a proper case.<sup>2</sup> So, experiments may sometimes be made in court, or evidence of such experiments, or practical tests, outside of court, may be given if they are shown to have been made under the same or precisely similar conditions to those shown to have existed in the case at bar.<sup>3</sup> Thus, where the question was as to whether a scar upon the bottom flange of a rail was made by a locomotive wheel as the rail lay across the track, and the defendant had exhibited the scarred rail in court, it was held proper for the plaintiff to introduce a similar wheel and section of rail, and, by experimenting or illustrating with them, to show to the jury that the wheel could not strike the lower flange of the rail as claimed by the defendant.<sup>4</sup> So, where the point in issue was whether a car moving slowly down an inclined plane with brakes set would, when the brakes were suddenly loosed, jump or spring suddenly forward, it was held error to exclude evidence of the result of an experiment made, at the same place and under the same conditions.<sup>5</sup> In another case evidence of an experi-

<sup>1</sup> *Senn v. Southern R. Co.*, 108 Mo. 142, s. c. 18 S. W. R. 1007. But compare *Louisville, etc., R. Co. v. Pearson*, 97 Ala. 211, s. c. 12 So. R. 176.

<sup>2</sup> *King v. New York Cent., etc., R. Co.*, 72 N. Y. 607. But see *McGrail v. Kalamazoo*, 94 Mich. 52, s. c. 53 N. W. R. 955.

<sup>3</sup> *Leonard v. Southern Pac. R. Co.*, 21 Ore. 555, s. c. 15 L. R. A. 221, and note; *Chicago, etc., R. Co. v. Champion*, (Ind.) 36 Cent. L. Jour. 280, and note (but see decision in the same case by the appellate court in 9 Ind. App. 510); *Lincoln v. Taunton, etc., Co.*, 9 Allen (Mass.) 181; *State v. Ellwood*,

17 R. I. 763, s. c. 24 Atl. R. 782; *Williams v. Taunton*, 125 Mass. 34; *People v. Levine*, 85 Cal. 39; *Dryer v. Brown*, 52 Hun (N. Y.) 321; *Chicago, etc., R. Co. v. Legg*, 32 Ill. App. 218; *Smith v. State*, 2 Ohio St. 511.

<sup>4</sup> *Leonard v. Southern Pac. R. Co.*, 21 Ore. 555, s. c. 15 L. R. A. 221, 28 Pac. 887. See, also, *Osborne v. Detroit*, 32 Fed. R. 36; *National Cash, etc., Co. v. Blumenthal*, 85 Mich. 464; *Farmers', etc., Bank v. Young*, 36 Iowa 44; *State v. Linkhaw*, 69 N. Car. 214, s. c. 12 Am. R. 645.

<sup>5</sup> *Chicago, etc., R. Co. v. Champion*, (Ind.) 32 N. E. R. 874, 36 Cent. L.



ment showing that the plaintiff's foot could have been caught in a switch as claimed was held competent,<sup>1</sup> and in still other cases evidence of experiments was admitted to show how long it would take a team to walk a certain distance between tracks at a crossing,<sup>2</sup> and in what direction a person would fall while standing on the step of a car if it was suddenly started.<sup>3</sup> But in all such cases, in order to render evidence of the experiments admissible they must be made under circumstances and conditions practically the same as those of the case on trial.<sup>4</sup>

§ 1701. **Presumptions.**—"A presumption, like a fact proved, remains available to the party in whose favor it arises, until overcome by opposing evidence,"<sup>5</sup> and usually has the force and effect of a *prima facie* case in so far as it applies.<sup>6</sup> But presumptions will not always supply proof of substantive facts,<sup>7</sup> for there must be something upon which to base them, and a presumption can not be based upon a presumption.<sup>8</sup>

Jour. 280, and note. (But see decision in the same case by the appellate court in 9 Ind. App. 510.)

<sup>1</sup> Brooke v. Chicago, etc., R. Co., 81 Iowa 504, s. c. 47 N. W. R. 74. But compare Klanowski v. Grand Trunk R. Co., 64 Mich. 279, s. c. 31 N. W. R. 275.

<sup>2</sup> Nosler v. Chicago, etc., R. Co., 73 Iowa 268, s. c. 34 N. W. R. 850.

<sup>3</sup> Gilbert v. Third Ave. R. Co., 22 J. & S. (N. Y.) 270, s. c. 8 N. Y. S. R. 152.

<sup>4</sup> Lake Erie, etc., R. Co. v. Mugg, 132 Ind. 168, s. c. 31 N. E. R. 564; Commonwealth v. Piper, 120 Mass. 185; Eidt v. Cutter, 127 Mass. 522; State v. Justus, 11 Ore. 178; State v. Fletcher, 24 Ore. 295, s. c. 33 Pac. R. 575, and note to Chicago, etc., R. Co. v. Champion, 36 Cent. L. Jour. 280, 283. See, also, State v. Lindoen, 87 Iowa 702, s. c. 54 N. W. R. 1076; United States v. Ried, 42 Fed. R. 134; Ulrich v. People, 39 Mich. 245; McKay v.

Lasher, 121 N. Y. 477; Sullivan v. Commonwealth, 93 Pa. St. 284; Hart v. State, 15 Tex. App. 202, 49 Am. R. 189, 191 and note. But compare Illinois Cent. R. Co. v. Burns, 32 Ill. App. 196.

<sup>5</sup> Bates v. Prickett, 5 Ind. 22.

<sup>6</sup> 1 Elliott's Gen. Pr., § 127; Montgomery v. Wasem, 116 Ind. 343, 355; Cleveland, etc., R. Co. v. Newell, 104 Ind. 264. A presumption of law, indeed, usually requires a particular inference or conclusion from a particular state of facts, and is binding upon both court and jury. Best's Princ. of Ev., §§ 42, 304; Justice v. Lang, 52 N. Y. 323.

<sup>7</sup> United States v. Ross, 92 U. S. 281.

<sup>8</sup> Manning v. Insurance Co., 100 U. S. 693, 698; 1 Elliott's Gen. Pr., § 127. See, also, Philadelphia, etc., R. Co. v. Henrice, 92 Pa. St. 431, s. c. 4 Am. & Eng. R. Cas. 544.

The burden of proof is frequently shifted by reason of some presumption, and presumptions may, as we have said, make out a *prima facie* case either for the plaintiff or for the defendant. Indeed, in many cases, especially in railroad litigation, the contest is largely a battle of presumptions.<sup>1</sup> We have elsewhere called attention to many of the most important presumptions that arise in railroad litigation. Thus, we have considered the presumption as to the authority of agents or employes acting for the company,<sup>2</sup> the presumption that a corporation has power to hold land conveyed to it,<sup>3</sup> the presumption of payment,<sup>4</sup> the presumption that a person approaching or on a railroad track is in full possession of his senses and will take care of himself;<sup>5</sup> the presumption that one injured at a crossing where he could have seen and heard an approaching train, either did not look, or, if he did look, did not heed what he saw;<sup>6</sup> the presumption where a fire is set by a locomotive;<sup>7</sup> the presumption of competency of an employe;<sup>8</sup> the presumption as to loss or injury where there are connecting carriers;<sup>9</sup> the presumption from loss or injury to freight,<sup>10</sup> or live stock;<sup>11</sup> the presumption that persons on passenger trains are passengers,<sup>12</sup> and the presumption from collisions,<sup>13</sup> derailment,<sup>14</sup> or other accidents.<sup>15</sup> It has also been held that where it is admitted that a certain company owns a railroad, the presump-

<sup>1</sup> Louisville, etc., R. Co. v. Thompson, 107 Ind. 442.

<sup>2</sup> See *ante*, §§ 220, *et seq.* 297, 303, 1255, 1265, 1406, *et seq.* A presumption, it has been held, may also arise from the uniform and acts of one in the capacity of a particular employe that he is employed by the company in the capacity in which he acts. Hughes v. New York, etc., R. Co., 36 N. Y. Super. Ct. (4 J. & S.) 222; Hoffman v. New York, etc., R. Co., 12 J. & S. (N. Y.) 1; Lampkins v. Vicksburg, etc., R. Co., 42 La. Ann. 997, s. c. 8 So. R. 530, 47 Am. & Eng. R. Cas. 622; Baltimore, etc., R. Co. v. Kane, 69 Md. 11, s. c. 13 Atl. R. 387. But see Sachrowitz v. Atchison,

etc., R. Co., 37 Kan. 212, s. c. 34 Am. & Eng. R. Cas. 382.

<sup>3</sup> See *ante*, § 423.

<sup>4</sup> See *ante*, § 1007.

<sup>5</sup> See *ante*, §§ 1153, 1253, 1257.

<sup>6</sup> See *ante*, §§ 1163, 1165.

<sup>7</sup> See *ante*, § 1242.

<sup>8</sup> See *ante*, §§ 1285, 1292. See, also, Mobile, etc., R. Co. v. Godfrey, 155 Ill. 78, s. c. 39 N. E. R. 590.

<sup>9</sup> See *ante*, § 1450.

<sup>10</sup> See *ante*, § 1516.

<sup>11</sup> See *ante*, § 1548 *et seq.*

<sup>12</sup> See *ante*, § 1578.

<sup>13</sup> See *ante*, § 1635.

<sup>14</sup> See *ante*, § 1634.

<sup>15</sup> See *ante*, §§ 1644, 1697. See, also, as to the conclusive presumption from

tion arises, in the absence of anything to the contrary, that it is operated by such company,<sup>1</sup> and that an engine bearing the initials of a certain company is owned and operated by it;<sup>2</sup> but the use of a railway track in a city by a switch engine raises no presumption that the owner of the engine owns and operates the track and sidings.<sup>3</sup> The presumption, in the absence of anything to the contrary, is that the company and its employees did their duty and complied with the law.<sup>4</sup> In some jurisdictions a presumption based on the instinct of self-preservation is indulged, and it is held that this presumption that one will exercise at least ordinary and reasonable care to avoid danger to himself is sufficient, in the absence of anything to the contrary, to cast the burden on the defendant to prove contributory negligence,<sup>5</sup> and that it may even be presumed that

physical facts and the operation of the laws of nature. *Post*, § 1703.

<sup>1</sup> *Peabody v. Oregon, etc., R. Co.*, 21 Ore. 121, s. c. 26 Pac. R. 1053; *Walsh v. Missouri Pac. R. Co.*, 102 Mo. 582, s. c. 14 S. W. R. 873, 15 S. W. R. 757; *Ferguson v. Wisconsin, etc., R. Co.*, 63 Wis. 145, s. c. 23 N. W. R. 123, 19 Am. & Eng. R. Cas. 285. See, also, *Blair v. St. Louis, etc., R. Co.*, 27 Fed. R. 176; *Ayles v. Southeastern R. Co.*, L. R. 3 Exch. 146.

<sup>2</sup> *Ryan v. Baltimore, etc., R. Co.*, 60 Ill. App. 612.

<sup>3</sup> *Calhoun v. Gulf, etc., R. Co.*, 84 Tex. 226, s. c. 19 S. W. R. 341.

<sup>4</sup> *Joyner v. South Carolina R. Co.*, 26 S. Car. 49, s. c. 1 S. E. R. 52; *Jewett v. Kansas City, etc., R. Co.*, 50 Mo. App. 547; *Reynolds v. Chicago, etc., R. Co.*, 85 Mo. 90; *Rafferty v. Missouri Pac. R. Co.*, 91 Mo. 33, s. c. 3 S. W. R. 393; *Uline v. New York, etc., R. Co.*, 101 N. Y. 98, s. c. 4 N. E. R. 536; *ante*, § 1299, and many other sections, stating that the burden of proof is upon the plaintiff, for the reason that negligence will not be presumed. As to the right of an em-

ployee, a stranger or a passenger, to rely on this presumption, see *ante*, §§ 1153, 1315, 1628; *Lake Erie, etc., R. Co. v. Brafford*, (Ind. App.) 43 N. E. R. 882. That one is found dead under a railroad car raises no presumption that he was killed by the negligence of the company. *Spears v. Chicago, etc., R. Co.*, 43 Neb. 720, s. c. 62 N. W. R. 68; *St. Louis, etc., R. Co. v. Parks*, 60 Ark. 187, s. c. 29 S. W. R. 464; *Johnston v. East Tenn., etc., R. Co.*, (Ky.) 30 S. W. R. 415.

<sup>5</sup> *Cleveland, etc., R. Co. v. Rowan*, 66 Pa. St. 393; *Lyman v. Boston, etc., R. Co.*, 66 N. H. 200, s. c. 11 L. R. A. 364; *Thomas v. Delaware, etc., R. Co.*, 8 Fed. R. 729; *Parsons v. Missouri Pac. R. Co.*, 94 Mo. 286, s. c. 6 S. W. R. 464; *Flynn v. Kansas City, etc., R. Co.*, 78 Mo. 195, s. c. 18 Am. & Eng. R. Cas. 23; *Adams v. Iron Cliffs Co.*, 78 Mich. 271, s. c. 44 N. W. R. 270; *Railroad Co. v. Gladmon*, 15 Wall. (U. S.) 401; *Continental, etc., Co. v. Stead*, 95 U. S. 161; *Northern Cent. R. Co. v. State*, 29 Md. 420; *Lehigh Valley R. Co. v. Hall*, 61 Pa. St. 361; *Weiss v. Penn-*

a traveler, who was injured at a crossing, stopped, looked and listened.<sup>1</sup> But even where this is held, it is also held that if the train by which he was injured was plainly visible from a point at which it was his duty to stop, look and listen, the presumption that he exercised due care is overcome.<sup>2</sup> In most of those jurisdictions in which it is held that the burden is upon the plaintiff to allege and prove freedom from contributory negligence, no such presumption is indulged.<sup>3</sup> Thus, where one is killed at a crossing, or the like, and there is no evidence as to what he was doing at the time, so as to show freedom from contributory negligence, it is held that his administrator can not recover, because there is a total failure of proof of an essential element of his case, and that it should be taken from the jury.<sup>4</sup>

sylvania R. Co., 79 Pa. St. 387; *Thompson v. Central R., etc., Co.*, 54 Ga. 509 (but see *Prather v. Richmond, etc., R. Co.*, 80 Ga. 427); *Baltimore, etc., R. Co. v. McKenzie*, 81 Va. 71, s. c. 24 Am. & Eng. R. Cas. 395. See *ante*, § 1163.

<sup>1</sup> *Pennsylvania R. Co. v. Weber*, 76 Pa. St. 157; *Chicago, etc., R. Co. v. Hinds*, (Kan.) 44 Pac. R. 993. See, also, *Whitford v. Southbridge*, 119 Mass. 564; *McBride v. Northern Pac. R. Co.*, 19 Ore. 64, s. c. 23 Pac. R. 814.

<sup>2</sup> *Sullivan v. New York, etc., R. Co.*, (Pa. St.) 34 Atl. R. 798; *Seamans v. Delaware, etc., R. Co.*, (Pa. St.) 34 Atl. R. 568; *Wilcox v. Rome, etc., R. Co.*, 39 N. Y. 358, s. c. 100 Am. Dec. 440. See, also, *Philadelphia, etc., R. Co. v. Stebbing*, 62 Md. 504, s. c. 19 Am. & Eng. R. Cas. 36; *Dunlavy v. Chicago, etc., R. Co.*, 66 Iowa 435, s. c. 23 N. W. R. 911.

<sup>3</sup> *Toledo, etc., R. Co. v. Brannagan*, 75 Ind. 490; *Indiana, etc., R. Co. v. Greene*, 106 Ind. 279, s. c. 6 N. E. R. 603; *Cordell v. New York, etc., R. Co.*, 75 N. Y. 330; *Wiwiowski v. Lake Shore, etc., R. Co.*, 124 N. Y. 420; *Rodrian v. New York, etc., R. Co.*,

125 N. Y. 526; *Warner v. New York, etc., R. Co.*, 44 N. Y. 465; *Chase v. Maine Cent. R. Co.*, 77 Me. 62, s. c. 19 Am. & Eng. R. Cas. 356; *Hinckley v. Cape Cod R. Co.*, 120 Mass. 257; *Wharton on Neg.*, § 421; *Patterson's Ry. Acc. Law*, 443; *Beach on Contrib. Neg.*, § 419, *et seq.* That the presumption is against the plaintiff, see *Hathaway v. Toledo, etc., R. Co.*, 46 Ind. 25; *Engrer v. Ohio, etc., R. Co.*, 142 Ind. 618, 42 N. E. R. 217, 219; *Cincinnati, etc., R. Co. v. Duncan*, 143 Ind. 524, 42 N. E. R. 37; *Cincinnati, etc., R. Co. v. Butler*, 103 Ind. 31, s. c. 2 N. E. R. 138. See *ante*, § 1163.

<sup>4</sup> *Kauffman v. Cleveland, etc., R. Co.*, (Ind.) 43 N. E. R. 446; *Toledo, etc., R. Co. v. Brannagan*, 75 Ind. 490; *Tyndale v. Old Colony R. Co.*, 156 Mass. 503, s. c. 31 N. E. R. 655; *Corcoran v. Boston, etc., R. Co.*, 133 Mass. 507, s. c. 12 Am. & Eng. R. Cas. 226; *Riley v. Connecticut River R. Co.*, 135 Mass. 292; *Bond v. Smith*, 113 N. Y. 378; *Wiwiowski v. Lake Shore, etc., R. Co.*, 124 N. Y. 420; *Reynolds v. New York Central, etc., R. Co.*, 58 N. Y. 248. *Contra*, *Longe-*

As we have elsewhere said,<sup>1</sup> we think this is the better better rule. An examination of the reported cases will show that in a large majority of them, especially in crossing cases, the plaintiff was guilty of contributory negligence, and it is a well-known fact that most men fail to exercise reasonable care in some matter and take risks that they could easily avoid by the exercise of such care, and which they know that they are negligent in taking, nearly every day. The instinct of self-preservation exerts little, if any, influence until the danger is perceived to be imminent. Thousands cross railroad tracks in safety where one is injured. It is almost impossible, under ordinary circumstances, for a traveler to be injured at a crossing if he exercises due care, and this is true in a majority of cases wherever he has means of knowing the danger and full control over his own actions. These considerations, and the fact that an individual can control his own actions so much more readily than a locomotive can be controlled, lead us to the conclusion that, on principle, the presumption ought to be against rather than in favor of one who is injured at a crossing, or the like, and that, in any event, no presumption of freedom from contributory negligence based solely on the instinct of self-preservation should be indulged in his favor. To indulge such a presumption upon that basis seems to us very much like basing a presumption upon a presumption, and a very weak one at that.<sup>2</sup>

§ 1702. **Withdrawing the case from the jury.**—It is frequently of the utmost importance to railroad companies which are defendants in damage cases to get them taken away from the jury, if possible, and, it is, perhaps, equally important for the plaintiff in most of such cases to have them left to the jury,

necker v. Pennsylvania R. Co., 105 Pa. St. 328; Phillips v. Milwaukee, etc., R. Co., 77 Wis. 349, s. c. 9 L. R. A. 521; and see Illinois Cent. R. Co. v. Nowicki, 148 Ill. 29, s. c. 35 N. E. R. 358; Hendrickson v. Great Northern R. Co., 49 Minn. 245, s. c. 51 N. W. R. 1044; and see Johnson v. Hudson River R. Co., 20 N. Y. 65.

<sup>1</sup> Ante, §§ 1163, 1165.

<sup>2</sup> See a strong presentation of this view in Beach on Contrib. Neg., §§ 419, 420, 423.

although there may be exceptionally strong cases, of course, which the plaintiff may desire to have taken from the jury. Where the facts are undisputed and but one reasonable inference can legitimately be drawn from them, the question becomes one of law and the case may be taken away from the jury.<sup>1</sup> So, it is held in most jurisdictions that if the evidence is so conclusive that the court would, under the law, be compelled to set aside a verdict returned in opposition to it, the case should be withdrawn from the jury upon proper application.<sup>2</sup> A mere *scintilla* of evidence is not sufficient to require the case to be submitted to the jury,<sup>3</sup> and if the plaintiff

<sup>1</sup> *Hathaway v. East Tenn., etc., R. Co.*, 29 Fed. R. 489; *Purcell v. English*, 86 Ind. 34, s. c. 44 Am. R. 255; *Goodlett v. Louisville, etc., R. Co.*, 122 U. S. 391; *Williams v. Guile*, 117 N. Y. 343, s. c. 6 L. R. A. 366; *Faris v. Ho-berg*, 134 Ind. 269, s. c. 33 N. E. R. 1028; *Oleson v. Lake Shore, etc., R. Co.*, 143 Ind. 405, 42 N. E. R. 736, (citing 2 *Elliott's Gen. Pr.*, § 889); *Johnson's Admr. v. Chesapeake, etc., R. Co.*, 91 Va. 171, s. c. 21 S. E. R. 238; *Toomey v. London, etc., R. Co.*, 3 C. B. N. S. 146; *People v. People's Ins. Exch.*, 126 Ill. 466, s. c. 2 L. R. A. 340, and note; *McMurtry v. Louisville, etc., R. Co.*, 67 Miss. 601, s. c. 4 Am. Neg. Cas. 308.

<sup>2</sup> *Randall v. Baltimore, etc., R. Co.*, 109 U. S. 478, s. c. 3 Sup. Ct. R. 322; *Schofield v. Chicago, etc., R. Co.*, 114 U. S. 615, 5 Sup. Ct. R. 1125; *Elliott v. Chicago, etc., R. Co.*, 150 U. S. 245, s. c. 14 Sup. Ct. R. 85; *Bagley v. Cleveland, etc., Co.*, 21 Fed. R. 159; *Pleasants v. Fant*, 22 Wall. (U. S.) 116; *Horn v. Baltimore, etc., R. Co.*, 54 Fed. R. 301; *Linkauf v. Lombard*, 137 N. Y. 417, s. c. 33 Am. St. R. 743, 749; *Glasscock v. Cent. Pac. R. Co.*, 73 Cal. 137; *Chicago, etc., R. Co. v. Landauer*, 36 Neb. 642, s. c. 54 N. W. R. 976; *O'Malley v. Missouri Pac. R. Co.*, 113 Mo.

319, s. c. 20 S. W. R. 1079; *Hemmens v. Nelson*, 138 N. Y. 517, 529; *Mynning v. Detroit, etc., R. Co.*, 64 Mich. 93, s. c. 8 Am. St. R. 804; *Lutz v. Atlantic, etc., R. Co.*, (N. Mex.) 16 L. R. A. 819; *Grube v. Missouri Pac. R. Co.*, 98 Mo. 330, 4 L. R. A. 776, and note; *Beckman v. Consolidation Coal Co.*, 90 Ia. 252, s. c. 57 N. W. R. 889; *Fronky v. Pennsylvania R. Co.*, (Pa.) 2 Atl. R. 536; *McEwen v. Hoopes*, (Pa.) 34 Atl. R. 623; *Allyn v. Boston, etc., R. Co.*, 105 Mass. 77; *Overby v. Chesapeake, etc., R. Co.*, 37 W. Va. 524, s. c. 16 S. E. R. 813; *Aycrigg's Exrs. v. New York, etc., R. Co.*, 30 N. J. L. 460; *Oleson v. Lake Shore, etc., R. Co.*, 143 Ind. 405, 42 N. E. R. 736, citing 2 *Elliott's Gen. Pr.*, § 889. "It would be an idle proceeding to submit the evidence to the jury when they could justly find in only one way." *North Penn. R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, s. c. 8 Sup. Ct. R. 266; *ante*, § 1179.

<sup>3</sup> *Hathaway v. East Tenn., etc., Co.*, 29 Fed. R. 489; *Hauser v. Central R. Co.*, 147 Pa. St. 440, s. c. 23 Atl. R. 766; *Sunnyside, etc., Co. v. Reitz*, (Ind.) 43 N. E. R. 46; *Connor v. Giles*, 76 Me. 132; *Cincinnati, etc., R. Co. v. Wood*, 82 Ind. 593; *Meyer v. Manhattan, etc., Co.*, (Ind.) 43 N. E. R. 448,

fails to prove the cause of action stated in his complaint,<sup>1</sup> or a single vital and essential element thereof,<sup>2</sup> the case should be taken from the jury upon the application of the defendant. But if the facts are disputed and the evidence conflicting, or if more than one reasonable inference can legitimately be drawn therefrom, the case must usually be left to the jury.<sup>3</sup> As shown in the preceding section, however, presumptions may make a

(citing 2 Elliott's Gen. Pr., §§ 854, 887, 889); *Culhane v. New York Cent., etc., R. Co.*, 60 N. Y. 133; *Linkauf v. Lombard*, 137 N. Y. 417, s. c. 33 N. E. R. 743, 748, 749. The cases cited in the last preceding note also affirm this doctrine. See, also, *Lake Erie, etc., R. Co. v. Stick*, 143 Ind. 449, s. c. 41 N. E. R. 365; *Cleveland, etc., R. Co. v. Wynant*, 134 Ind. 681, s. c. 34 N. E. R. 569; *Hudson v. Rome, etc., R. Co.*, 145 N. Y. 408, s. c. 40 N. E. R. 8; *Babcock v. Fitchburg, etc., R. Co.*, 140 N. Y. 308, s. c. 35 N. E. R. 596.

<sup>1</sup> *Palmer v. Chicago, etc., R. Co.*, 112 Ind. 250; *Marcum v. Smith*, 26 Mo. App. 460; 2 Elliott's Gen. Pr., §§ 854, 889; *Waldhier v. Hannibal, etc., R. Co.*, 71 Mo. 514; *Memphis, etc., R. Co. v. Chastine*, 54 Miss. 503; *Louisville, etc., R. Co. v. Dancy*, 97 Ala. 338, s. c. 11 So. R. 796; *Cotter v. Alabama, etc., R. Co.*, 61 Fed. R. 747.

<sup>2</sup> 2 Elliott's Gen. Pr., § 889; *Cordell v. New York, etc., R. Co.*, 75 N. Y. 330; *Meyer v. Manhattan, etc., Co., (Ind.)* 43 N. E. R. 448; *Harrigan v. Chicago, etc., R. Co.*, 53 Ill. App. 344. See, also, *Hinckley v. Cape Cod R. Co.*, 120 Mass. 257; *City of Huntingburg v. First, (Ind. App. Ct.)* 43 N. E. R. 17, 19; *Rush v. Coal, etc., Mining Co.*, 131 Ind. 135, s. c. 30 N. E. R. 904; *City of Bedford v. Neal*, 143 Ind. 425, s. c. 41 N. E. R. 1029, 1031; *Toledo, etc., R. Co. v. Brannegan*, 75 Ind. 490; *Cleveland, etc., R. Co. v. Wynant*, 134

Ind. 681; *Terre Haute, etc., R. Co. v. McCorkle*, 140 Ind. 613, 623; *Stager v. Bridge Ave., etc., R. Co.*, 119 Pa. St. 70, s. c. 12 Atl. R. 821; *Gores v. Graff*, 77 Wis. 174, s. c. 46 N. W. R. 48.

<sup>3</sup> *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349, s. c. 14 Sup. Ct. R. 140; *Kansas City, etc., R. Co. v. Kirksey*, 60 Fed. R. 999, 1002; *Railroad Co. v. Stout*, 17 Wall. (U. S.) 657; *Beatty v. Mutual, etc., Assn.*, 75 Fed. R. 65, 68, and authorities there cited; *Johnson v. Missouri Pac. R. Co.*, 18 Neb. 690, s. c. 26 N. W. R. 347; *Pullman, etc., Co. v. Laack*, 143 Ill. 242, s. c. 32 N. E. R. 285, 18 L. R. A. 215; *Neubacher v. Indianapolis, etc., R. Co.*, 134 Ind. 25, s. c. 33 N. E. R. 25; *Richmond, etc., R. Co. v. Powers*, 149 U. S. 43, s. c. 13 Sup. Ct. R. 748; *Anderson v. North Pac. R. Co.*, 21 Ore. 281; *Evans v. Lake Shore, etc., R. Co.*, 88 Mich. 442; *Illinois Cent. R. Co. v. Turner*, 71 Miss. 402, s. c. 14 So. R. 450; *Hangen v. Chicago, etc., R. Co.*, 3 So. Dak. 394, s. c. 53 N. W. R. 769; *Bates v. Fremont, etc., R. Co., (S. Dak.)* 61 Am. & Eng. R. Cas. 392; *Central R. Co. v. Moore*, 24 N. J. L. 824; *Avinger v. South Car. R. Co.*, 29 S. Car. 265, s. c. 13 Am. St. R. 716; *Smith v. Easton, etc., Co.*, 167 Pa. St. 209, s. c. 31 Atl. R. 557; *Harter v. Atchison, etc., R. Co.*, 55 Kan. 250, s. c. 38 Pac. R. 778; *O'Brien v. Chicago, etc., R. Co., (Wis.)* 66 N. W. R. 363.

*prima facie* case, and when they do, unless there is evidence to the contrary, they will justify the withdrawal of the case from the jury.<sup>1</sup> Thus, where the plaintiff has the burden of proving that his own negligence did not proximately contribute to his injury the case should be taken from the jury if he fails to introduce evidence to overcome the presumption. A case may be withdrawn from the jury by demurrer to the evidence,<sup>2</sup> compulsory nonsuit,<sup>3</sup> or a peremptory instruction directing a verdict.<sup>4</sup> The practice of demurring to the evidence does not seem to obtain in all jurisdictions, nor does that of moving for a nonsuit, but it is believed that a peremptory instruction may be requested and a verdict directed, in a proper case, in all jurisdictions. This is the most common mode of withdrawing a case from the jury, and it is error for the court to refuse to direct a verdict upon proper application when it is its duty to do so under the rules already stated.<sup>5</sup> The motion may be

<sup>1</sup> *Talkington v. Parish*, 89 Ind. 202; *De Wald v. Kansas City, etc., Co.*, 44 Kan. 586, s. c. 24 Pac. R. 1101; *Ohio, etc., R. Co. v. Dunn*, 138 Ind. 18, s. c. 36 N. E. R. 702.

<sup>2</sup> As to the rules and practice on demurrer to the evidence, see 2 Elliott's Gen. Pr., §§ 855-871; 2 Tidd's Pr., 865; *Summers v. Louisville, etc., R. (Tenn.)* 35 S. W. R. 210; *Illinois Cent. R. Co. v. Brown (Tenn.)* 35 S. W. R. 560, (both cases citing 2 Elliott's Gen. Pr., §§ 855, 856); *Suydam v. Williamson*, 20 How. (U. S.) 427; *Joliet, etc., R. Co. v. Veile*, 140 Ill. 59, s. c. 29 N. E. R. 706; *Hopkins v. Nashville, etc., R. Co. (Tenn.)* s. c. 34 S. W. R. 1029; *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305, s. c. 10 Am. St. R. 136, and note; *Lake Shore, etc., R. Co. v. Foster*, 104 Ind. 293; *Chicago, etc., R. Co. v. Williams*, 131 Ind. 30.

<sup>3</sup> As to the practice on motion for nonsuit, see 2 Elliott's Gen. Pr., §§ 876-882; *Gould on Pleading*, (Heard's ed.) 557; note to *French v. Smith*, 24 Am. Dec. 622; *Fagundes v.*

*Central Pac. R. Co.*, 79 Cal. 97, s. c. 3 L. R. A. 824; *Quinlan v. Welch*, 141 N. Y. 158, s. c. 36 N. E. R. 12; *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389, s. c. 33 N. E. R. 475; *Rochat v. North Hudson, etc., R. Co.*, 49 N. J. L. 445, s. c. 9 Atl. R. 688, 10 Atl. R. 710. As shown in the text-book first cited this practice does not prevail in all jurisdictions, and even where it does it differs largely in detail and sometimes in effect.

<sup>4</sup> "This practice," says Mr. Justice Swayne, "is a wise one. It saves time and costs. It gives the certainty of applied science to the results of judicial investigations. It draws clearly the line which separates the province of the judge and jury, and fixes where it belongs the responsibility which should be assumed by the courts." *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604, 637.

<sup>5</sup> 2 Elliott's Gen. Pr., § 887; *Carroll v. Interstate, etc., Co.*, 107 Mo. 653, s. c. 17 S. W. R. 889; *Mynning v. Detroit, etc., R. Co.*, 64 Mich. 93, s. c. 8



made by the defendant either at the close of the plaintiff's evidence or after the evidence on both sides has been heard.<sup>1</sup> But if the defendant makes his motion at the close of the plaintiff's case, and subsequently introduces evidence in his own behalf, he will, according to the weight of authority and the better reason, be deemed to have waived his motion, and any exception he may have taken to the ruling of the court thereon, unless he thereafter renews it.<sup>2</sup> The plaintiff can not, of course, successfully move to direct a verdict until after the defendant has introduced his evidence.<sup>3</sup>

§ 1703. **Physical facts.**—It is an old saying that "actions speak louder than words," and so there are sometimes physical facts present in a case sufficient in strength to overcome the evidence of witnesses. Well established laws of nature and similar well-known scientific and physical facts of which the courts will take judicial knowledge may not only justify a trial court in directing a verdict or in setting aside a verdict and granting a new trial, but may also be sufficient to cause the appellate court to reverse the action of the trial court where it fails to give effect to such facts by directing a verdict or granting a new trial. Notwithstanding the general rule, which prevails in most jurisdictions, that the court, on appeal, will not weigh the evidence, neither the appellate court nor the trial court should stultify itself by allowing a verdict to stand, al-

Am. St. R. 804; *Baltimore, etc., R. Co. v. Stricker*, 51 Md. 47; *Atchison, etc., R. Co. v. Loree*, 4 Neb. 446; *Wilson v. Groelle*, 83 Wis. 530, s. c. 53 N. W. R. 900, and cases cited in the first two notes to this section.

<sup>1</sup> 2 Elliott's Gen. Pr., § 888, and numerous authorities there cited; note to *People v. People's Ins. Exch.*, 2 L. R. A. 340; *Wilsey v. Louisville, etc., R. Co.*, 83 Ky. 511; *Bartelott v. International Bank*, 119 Ill. 259.

<sup>2</sup> *Poling v. Ohio River R. Co.*, 38 W. Va. 645, s. c. 18 S. E. R. 782; *Columbia, etc., R. Co. v. Hawthorne*, 144 U.

S. 202, s. c. 12 Sup. Ct. R. 591; *North-ern, etc., R. Co. v. Mares*, 123 U. S. 710, s. c. 8 Sup. Ct. R. 321; *Northern Pac. R. Co. v. Charles*, 51 Fed. R. 562; *Joliet, etc., R. Co. v. Shields*, 134 Ill. 209, s. c. 25 N. E. R. 569; *Chicago, etc., R. Co. v. Van Vleck*, 143 Ill. 480, s. c. 32 N. E. R. 262. But see *Weber v. Kansas City, etc., R. Co.*, 100 Mo. 194, s. c. 18 Am. St. R. 541; *Rochat v. North Hudson, etc., R. Co.*, 49 N. J. L. 445, s. c. 9 Atl. R. 688; *Wadlington v. Newport News, etc., R. Co.*, (Ky.) 20 S. W. R. 783.

<sup>3</sup> *Kingsford v. Hood*, 105 Mass. 495.

though there may be evidence tending to support it, where the physical facts are such as to demonstrate that such evidence is untrue and the verdict unjust and unsupported in law and in fact. In a recent case the plaintiff testified that he stopped and looked and listened when about six feet from a railroad crossing and saw no engine, and that as soon as he stepped inside the first rail of the track an engine noiselessly approached and struck him; that his sense of hearing was perfect, and that there was nothing to obstruct sound or prevent him from hearing. There was also undisputed evidence that the engine and tender weighed eighty tons, had fourteen wheels and was running at the rate of at least twenty-five miles an hour. The supreme court held that it was a physical impossibility that the engine could move at that rate without making any noise, and that the plaintiff must have heard it if he had looked and listened, as he testified that he did, and the judgment of the trial court on the verdict for the plaintiff was reversed.<sup>1</sup> In another recent case the appellate court said that while it had no power to weigh the evidence, yet "where the evidence which appears to be in conflict is nothing more than a mere *scintilla*, or where it is met by well known and scientific facts, about which there is no dispute, this court will still exercise jurisdiction to review and reverse."<sup>2</sup> So, where it was necessary to assume, in order to support the verdict, that the plaintiff was

<sup>1</sup> Lake Erie, etc., R. Co. v. Stick, 143 Ind. 449, s. c. 41 N. E. R. 365. The court said that, excluding all evidence except that of the plaintiff as to the exercise of due care on his part, and "considering alone his testimony on that point, and the matters of general notoriety and every day observation, and our knowledge of the laws of nature, we must and do know that the engine going at the rate of speed of from twenty-five to thirty-five miles an hour, the appellee must have heard and did hear it." The court also laid down the rules that should govern trial judges in such cases and severely re-

buked those who have not the courage to promptly set aside unjust verdicts. See, also, Miller v. Terre Haute, etc., R. Co., 44 N. E. R. 257; Oleson v. Lake Shore, etc., R. Co., 143 Ind. 405, s. c. 42 N. E. R. 736; Mann v. Belt R., etc., Co., 128 Ind. 138, 144, s. c. 26 N. E. R. 819.

<sup>2</sup> Hudson v. Rome, etc., R. Co., 145 N. Y. 408, s. c. 40 N. E. R. 8. In this case it was held that a crown sheet could not have been stretched from ten to fourteen inches without a crack or flaw, while it was cool and under water.

fully nine feet high the appellate court reversed the judgment and granted a new trial.<sup>1</sup> In another case a verdict was set aside because the court knew that if the plaintiff had been exercising ordinary care and occupying the position he claimed he was occupying, he could not have been injured in the manner in which the undisputed evidence showed that he was injured.<sup>2</sup> And in many other cases verdicts have been set aside because they could only be supported by assuming or believing something contrary to human experience or the laws of nature.<sup>3</sup> There are many facts of which courts *ex officio* take notice, and neither averment nor proof will prevail against matters which are judicially known to the court.<sup>4</sup> The courts will not allow the verdicts of juries to stand when they rest on evidence which the courts judicially know to be incredible.

<sup>1</sup> Hunter v. New York, etc., R. Co., 116 N. Y. 615, s. c. 23 N. E. R. 9.

<sup>2</sup> Brennan v. Brooklyn Heights, etc., R. Co., 33 N. Y. Supp. 852.

<sup>3</sup> See Johns v. Northwestern, etc., Asso., 90 Wis. 332, s. c. 63 N. W. R. 276; 2 Best on Ev., 1096; Cauley v. Pittsburgh, etc., R. Co., 98 Pa. St. 498; San Antonio, etc., R. Co. v. Choate, (Texas Civ. App.) 35 S. W. R. 180.

<sup>4</sup> Jones v. United States, 137 U. S. 202, s. c. 11 Sup. Ct. R. 80; Jameson v. Indiana, etc., Co., 128 Ind. 555; Nagel v. Missouri, etc., R. Co., 75 Mo. 665; Udderzook's Case, 76 Pa. St. 340; Garth v. Caldwell, 72 Mo. 622; State v. Hayes, 78 Mo. 307; Lanigan v. New York, etc., R. Co., 71 N. Y. 29; Freese v. State, 23 Fla. 267.

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